TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 231.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO, PLAINTIFF IN ERROR,

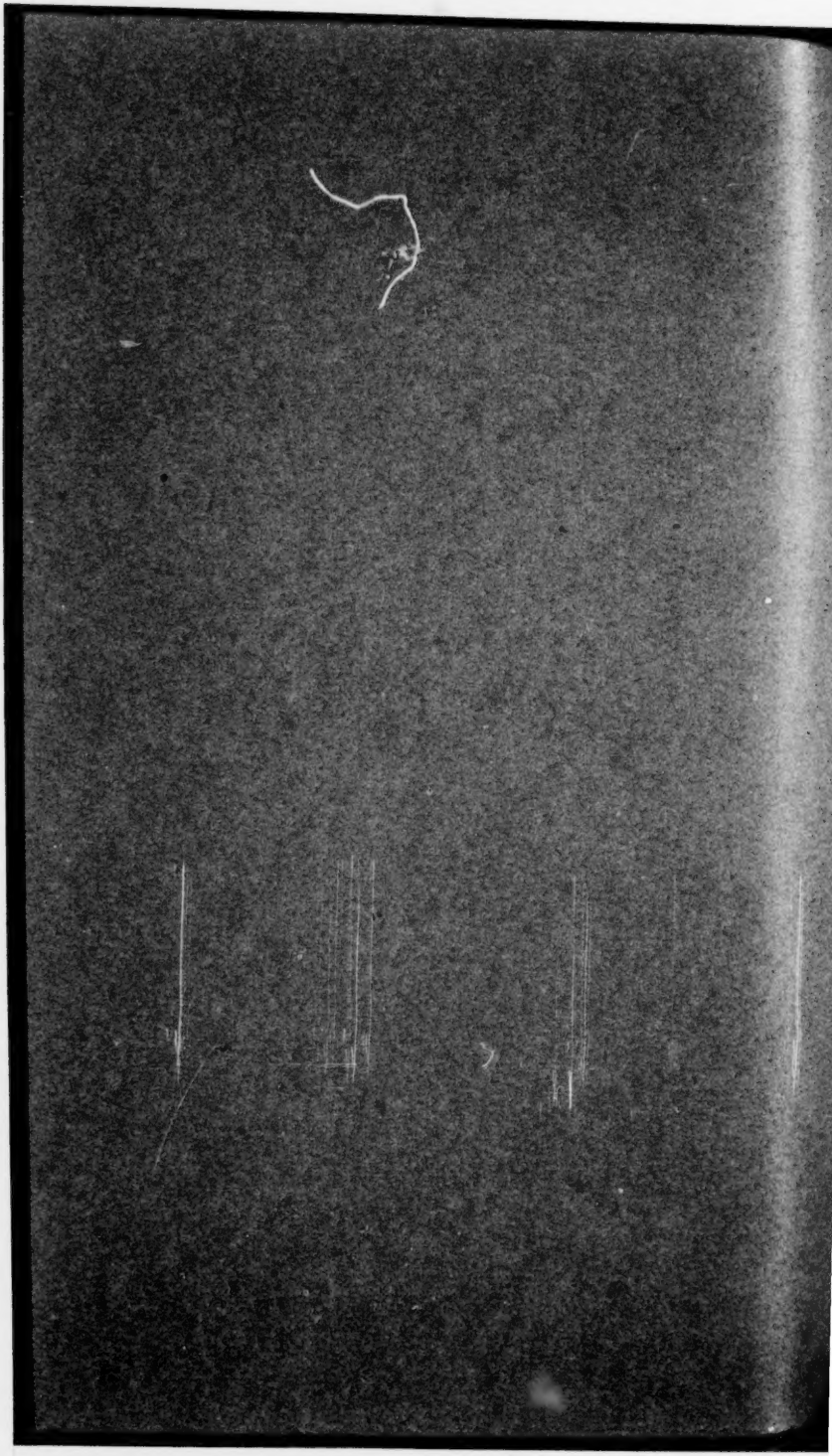
vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED MARCH 17, 1900.

(17,691.)



(17,691.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 231.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO, PLAINTIFF IN ERROR,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

	Original.	Print
Caption	1	1
Transcript from the district court of the county of Cass	1	1
Summons	1	1
Complaint	2	2
Notice of no personal claim	17	12
Answer of the Red River Valley National Bank	18	13
Affidavit of default	22	15
Statement of costs and disbursements, &c	24	17
Notice to settle findings, &c	27	19
Findings of fact	28	20
Conclusions of law	41	28
Judgment	45	31
Stipulation to amend judgment, &c	63	43
Order to amend judgment, &c	64	44
Notice of appeal	65	44
Bond on appeal	66	45

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1900.

	Original.	Print
Judge's certificate	68	46
Clerk's certificate	69	47
Assignment of errors	70	47
Hearing and submission	72	49
Judgment	73	49
Opinion	74	50
Petition for rehearing	81	55
Order denying petition for rehearing	83	56
Petition for writ of error	84	57
Bond on writ of error	87	59
Assignment of errors	89	60
Clerk's certificate	91	62
Writ of error	92	62
Citation	94	63
Acceptance of service of citation	95	63

1 STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Brothers; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nurenberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Defendants in Error,

vs.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO, Plaintiff in Error.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance to the mandate heretofore attached in the above entitled action, do hereby make return as follows:

On the 15th day of September, 1899, there was filed in my said office a record on appeal from the district court of the county of Cass, in the said State of North Dakota; which record is in words and figures as follows, to wit:

STATE OF NORTH DAKOTA, *County of Cass.*

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Reemer Roofing Co.; Matt Nurenberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

Summons.

2 State of North Dakota to the above-named defendants:

You and each of you are hereby summoned to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscribers, Newton & Smith, within thirty days after the service of this summons upon you, exclusive of the day of service, and in case of your failure to

appear or answer, judgment will be taken by default for the relief demanded in the complaint.

Dated at Fargo, Cass county, North Dakota, this 15th day of November, 1899.

NEWTON & SMITH,
Attorneys for the Plaintiffs Archibald J. Craig, F. X. Goulet, Hance Bros., Henry E. Magill, S. F. Remer, and Gruber & Co.
BENTON, LOVELL & BRADLEY,
Attorneys for the Plaintiffs Menomonie Hydraulic Press Brick Co. and Fargo Gas & Electric Co.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALley National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

Complaint.

3 The plaintiffs in the above-entitled action for their causes of action therein against the defendants above named complain and allege:

1.

That the plaintiff The Menominie Hydraulic Press Brick Co. is a foreign corporation and is the same corporation as the Northern Hydraulic Press Co., in whose name the lien hereinafter described was filed, this plaintiff corporation herein being the successor to all the rights and liabilities of the Northern Hydraulic Press Brick Co. by virtue of the reorganization of said last-named corporation.

2.

That the plaintiffs Horace Hance and Edward B. Hance were during the times hereinafter mentioned partners doing business at Fargo, North Dakota, as Hance Bros.

3.

That the plaintiff The Fargo Gas & Electric Co. is a corporation duly organized and doing business under and by cirtue of the laws of the State of North Dakota.

4.

That the plaintiff Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., are the successors to the Fargo Tile Walk Co., in whose name the lien hereinafter described was filed by virtue of the reorganization of said last-named company and the association of the plaintiff A. Gruber therein for J. A. Gruber.

5.

That the plaintiff S. F. Remer is the same person — whose name the lien hereinafter described was filed as the Remer Roofing Co.

6.

That the defendant The Red River Valley National Bank of Fargo is a corporation duly organized and doing business under and by virtue of the laws of the United States.

4 7.

That the defendant The Beidler-Robinson Lumber Co. is a corporation organized under and by virtue of the laws of the State of North Dakota.

8.

That George A. Wheaton and Clinton A. Reynolds, hereinafter named, were during the time hereinafter mentioned partners doing business as Wheaton, Reynolds & Co.

9.

That on and prior to the dates hereinafter stated, except as hereinafter shown, the defendant Rosa Herzman was the owner in fee and the reputed owner of lot six (6), in block five (5), of the original town site of Fargo, now the city of Fargo, Cass county, North Dakota, and the building thereon standing, and upon information and belief that the defendant The Red River Valley National Bank of Fargo, since on or about the 15th day of May, 1895, has been and now is the owner and the reputed owner thereof.

10.

For a cause of action herein in favor of the plaintiff, Archibald J. Craig allege-:

That on or about the 2nd day of October, 1893, the defendant Rosa Herzman and the plaintiff Archibald J. Craig entered into an agreement whereby the said plaintiff contracted to provide certain labor and materials towards the erection and completion of a heating plant upon the lot hereinbefore in paragraph 9 hereof described and within the building thereon standing, and therefor the said Rosa Herzman agreed to pay the plaintiff Archibald J. Craig the value of the labor and materials furnished; that the plaintiff Archibald J. Craig fully kept and performed his said agreement, and completed the furnishing of said labor and materials for the improvement aforesaid under said contract on or before the 2nd

day of November, 1893; that the value of such labor and materials so furnished for the purpose of making said improvement upon said premises was the sum of $285.00; that said labor and materials
5 were furnished between October 1st, 1893, and November 2nd, 1893, and that thereafter, on or about November 20th, 1893, at 4.30 o'clock p. m., such plaintiff, Archibald J. Craig, for the purpose of securing and perfecting a lien for the moneys so due him, as aforesaid, under said contract upon the building and lot hereinbefore described under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court for said Cass county a just and true account of such demand after allowing all credits, and containing a correct description of the property to be charged therewith and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that said sum has never been paid and is now due and owing, together with the interest thereon from November 2nd, 1893, except the sum of $15.10 paid thereafter thereon.

11.

For a cause of action herein in favor of the plaintiff, The Menominie Hydraulic Press Brick Co. allege:

That on or about the 11th day of October, 1893, the Northern Hydraulic Press Brick Co. entered into a contract with one L. Johnson, who at said time was doing the labor upon and furnishing materials for the building upon the premises hereinbefore in paragraph 9 hereof described by virtue of a contract with one William H. Merritt, and that said Merritt at said time had made and entered into a contract with the defendant Rosa Herzman to furnish certain materials for and to do certain labor upon the erection of a building upon the premises hereinbefore described, and that said Northern Hydraulic Press Brick Co., under and by virtue of the contracts hereinbefore set forth, agreed to furnish certain materials, as subcontractor, for the erection of said building, and on or about the 3rd day of October, 1893, did furnish such materials and in all respects fully kept and performed all agreements to be by it kept and performed, but that said defendant, Rosa Herzman, has not
6 paid for the materials so furnished nor any part thereof either to the Northern Hydraulic Press Brick Co. or to any other person for its benefit; that the value of the materials so furnished for the erection of said building upon the premises hereinbefore described was $70.00, no part of which has been paid except the sum of $3.34.

That on or about the 13th day of December, 1893, said Northern Hydraulic Press Brick Co., for the purpose of securing and perfecting a lien for the moneys so due it, as aforesaid, upon the building and land hereinbefore described under the provisions of the mechanics' lien laws for the State of North Dakota, filed in the office of the clerk of the district court in said Cass county a just and true account of the demand due it after allowing all credits, and containing a correct description of the property to be charged and verified

by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of the said court and an abstract thereof made, as required by law; that said sum, together with the interest thereon, is now due and wholly unpaid.

12.

For a cause of action herein in favor of the plaintiff, F. X. Goulet allege-:

That on or about the 15th day of June, 1893, the defendant Rosa Herzman and the plaintiff F. X. Goulet entered into a contract whereby said plaintiff agreed to sell and deliver to said Rosa Herzman, on board cars at Staples, Minnesota, bricks at $6.00 per thousand for and to be used in the construction of a building upon the lot hereinbefore in paragraph 9 of this complaint described; that in compliance with said contract, between the 21st day of August, 1893, and September 20th, 1893, said plaintiff delivered on board cars at Staples, Minnesota, 87,345 brick, of the value of $534.00, and that thereafter said bricks were received by said Rosa Herzman and used in the construction of said building; that thereafter from time to time before the 19th day of December, 1893, sundry payments were
7 made upon said indebtedness, amounting to $320.74, leaving a balance unpaid of $213.26; that the delivery of said bricks commenced on the 21st day of August, 1893, and was completed on the 20th day of September, 1893; that thereafter, on or about December 19th, 1893, at 3.20 o'clock p. m., such plaintiff, F. X. Goulet, for the purpose of securing and perfecting a lien for the moneys so due him, as aforesaid, under said contract upon the building and land hereinbefore described under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court for said Cass county a just and true account of said demand after allowing all credits, and containing a correct description of the property to be charged therewith and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that since said lien was so filed the said Rosa Herzman paid on said indebtedness the sum of $25.00, January 5th, 1894, and thereafter the sum of $11.30, and that there is now due and unpaid upon said demand the sum of $177.16, together with the interest thereon.

13.

For a cause of action herein in favor of the plaintiffs, Hance Bros. allege:

That on or about November 17th, 1893, the plaintiff Hance Bros. entered into a contract with one William H. Merritt, who at the time was doing labor upon and furnishing materials for the building upon the premises hereinbefore in paragraph 9 hereof described by virtue of the contract with the defendant Rosa Herzman, and that the said William H. Merritt had at said time contracted with said defendant, Rosa Herzman, to furnish certain materials for and to do certain labor upon the erection of the building upon the prem-

ises hereinbefore described; that said Hance Bros., under and by virtue of the contracts hereinbefore mentioned, agreed to furnish certain labor, materials, and hardware, as subcontractors, for
8 the erection of said building, and on or about November 17th, 1893, did furnish such labor, materials, and hardware and in all respects fully kept and performed all agreements to be by them kept and performed; that said Rosa Herzman has not paid for said labor, materials, and hardware or any part thereof either to such plaintiffs or to any other person for their benefit or otherwise; that the value of the labor, materials, and har-ware so furnished for the erection of said building, as hereinbefore shown, was the sum of $67 06; that the same is now due, owing, and unpaid except the sum of $3.55 paid thereafter thereon; that thereafter, on or about January 12th, 1894, at 5.20 o'clock p. m., said plaintiffs, Hance Bros., for the purpose of securing and perfecting a lien for the moneys so due them, as aforesaid, upon the land and buildings hereinbefore in paragraph 9 hereof described under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court in said Cass county a just and true account of the demands due them after allowing all credits, and containing a correct description of the property to be charged therewith and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law, and that said sum, together with the interest thereon, is still due and unpaid.

14.

For a cause of action herein in favor of the plaintiff, The Fargo Gas & Electric Co. allege-:

That on or about the 1st day of November, 1893, the plaintiff The tered Fargo Gas & Electric Co. and the defendant Rosa Herzman en into an agreement whereby said Fargo Gas & Electric Co. agreed to wire and place the building on the premises hereinbefore in paragraph 9 hereof described in readineas for placing electric lights therein and the defendant Rosa Herzman agreed to pay said Fargo Gas & Electric Co. therefor upon the completion thereof the
9 value of the labor and materials so furnished; that said Fargo Gas & Electric Co. completed the furnishing of such labor and material for the improvement aforesaid under said contract on the 1st day of January, 1894, and that it has fully kept and performed the said agreement in all things to be by it kept and performed; that said defendant has not paid for the labor and material so furnished nor any part thereof; that the value of the labor and material so furnished for the purpose of making said improvement upon the premises hereinbefore described was $72.90; that the Fargo Gas & Electric Co. began to furnish labor and materials for said improvement under said contract on November 15th, 1893, and that all of said labor and materials were furnished for said improvement between that date and the 1st day of January, 1894, on which last-named date the last labor and material for said improvement were furnished; that on or about the 13th day of January,

1893, said Fargo Gas & Electric Co., for the purpose of securing and perfecting a lien for the moneys so due it as aforesaid under said contract upon the building and land hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court for said Cass county a just and true account of the demand due it after allowing all credits, and containing a correct description of the property to be charged and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract made as required by law, and that said demand, together with the interest thereon, is now due, owing, and unpaid.

15.

For a cause of action in favor of the plaintiff Henry E. Magill allege:

That on or about October 1st, 1893, the said Wheaton, Reynolds & Co. entered into a contract with one William H. Merritt, who at said time was doing labor upon and furnishing materials for a building upon the lot hereinbefore in paragraph 9 hereof described, by virtue of a contract with the defendant Rosa Herzman, and that said William H. Merritt had at said time contracted with said defendant, Rosa Herzman, to furnish certain materials for and to do certain labor upon the erection of a building upon the premises hereinbefore described; that said Wheaton, Reynolds & Co., under and by virtue of the contracts hereinbefore mentioned, agreed to furnish certain labor and materials and mill-work, as subcontractors, for the erection of said building, and on or about the 12th day of October, 1893, did furnish such labor, materials, and mill-work, and in all respects fully kept and performed all agreements to be by them kept and performed; that said Rosa Herzman has not paid for said labor, materials, and mill-work so furnished or any part thereof, either to said Wheaton, Reynolds & Co. or to any other person for their benefit or otherwise; that the value of the labor, material, and mill-work so furnished for the erection of said building, as hereinbefore shown, was the sum of $372.73; that the same is now due, owing, and unpaid, except the sum of $19.72, paid thereafter thereon; that thereafter, on or about the 16th day of January, 1893, at 9.35 o'clock a. m., the said Wheaton, Reynolds & Co., for the purpose of securing and perfecting a lien for the moneys so due them, as aforesaid, upon the land and building hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court in and for said Cass county a just and true account of the demand due to them after allowing all credits, and containing a correct description of the property to be charged therewith and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court, and an abstract thereof made as required by law, and that said sum, together with the interest thereon, is still due and unpaid; that thereafter, on or about the 15th day of April, 1897, the said Wheaton,

Reynolds & Co. duly made an assignment in writing of all their estate, including such demand and lien, to one Walter A. Eggleston for the benefit of their creditors, and the said Walter A. Eggleston accepted said trust and duly qualified therein, and that
11 thereafter, on or about the 1st day of November, 1898, for valuable consideration, the said Walter A. Eggleston, as such assignee for the benefit of creditors, duly signed and transferred, in writing, the said demand and said lien and the lien hereinafter mentioned to the plaintiff Henry E. Magill, and that said Henry E. Magill is now the owner and holder of all the said demand and liens.

16.

For a cause of action herein in favor of the plaintiff S. F. Remer allege:

That on or about October 1st, 1893, the said S. F. Remer entered into a contract with one William H. Merritt, who at said time was doing labor upon and furnishing materials for a building upon the lot hereinbefore, in paragraph 9 hereof, described by virtue of a contract with the defendant Rosa Herzman, and that said William H. Merritt had at said time contracted with said defendant, Rosa Herzman, to furnish certain materials for and to do certain labor upon the erection of a building upon the premises hereinbefore described; that the said F. S. Remer, under and by virtue of the contracts hereinbefore mentioned, agreed to furnish certain labor and materials and roofing, as subcontractor, for the erection of said building, and on or about the 11th day of November, 1893, did furnish such labor, materials, and roofing and in all respects fully kept and performed all agreements to be by him kept and performed; that said Rosa Herzman has not paid for said labor, materials, and roofing so furnished or any part thereof, except as hereinafter shown, either to said S. F. Remer or to any other person for his benefit or otherwise; that the value of the labor, materials, and roofing for the erection of said building, as hereinbefore shown and unpaid, was the sum of $102.00; that the same is now due, owing, and unpaid, except the sum of $5.40, paid thereafter thereon; that thereafter, on or about the 17th day of January, 1894, at the hour of 10.12 o'clock a. m., and within sixty days after all the said labor, mate-
12 rials, and roofing had been done and furnished, the said S. F. Remer, as the Remer Roofing Co., for the purpose of securing and perfecting a lien for the moneys so due him, as aforesaid, upon the land and buildings hereinbefore described under the provisions of the mechanics' lien law of the State of North Dakota, filed in the office of the clerk of the district court in and for said Cass county a just and true account of the demand due to him after allowing all credits, and containing a correct description of the property to be charged therewith and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law, and that said sum, together with the interest thereon, is still due and unpaid.

17.

For a cause of action herein in favor of the plaintiffs Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., allege :

That on or about the 1st day of October, 1893, the defendant Rosa Herzman and said Fargo Tile Walk Co. entered into an agreement whereby said company contracted to provide certain labor and materials for a sidewalk in front of the lot hereinbefore, in paragraph 9 hereof, described, and therefor the said Rosa Herzman agreed to pay said Fargo Tile Walk Co. the value of said labor and materials so furnished ; that the said company fully kept and performed its said agreement and completed the furnishing of said labor and materials for the improvement aforesaid under said contract on or before the 2nd day of November, 1893 ; that the value of such labor and materials so furnished for the purpose of making said improvement upon said premises was the sum of $32.00 ; that said labor and materials were furnished between October 1st, 1893, and November 2nd, 1893, at which date said delivery was completed ; that thereafter, on or about February 7th, 1894, at 9 o'clock a. m., such Fargo Tile Walk Co., for the purpose of securing and perfecting a lien for the moneys so due it, as aforesaid, under said contract upon
13 the building and land hereinbefore described under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court for said Cass county a just and true account of such demand after allowing all credits, and containing a correct description of the property to be charged therewith, verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law ; that said sum has never been paid and is now due and owing, together with the interest thereon from November 2nd, 1893.

18.

Upon information and belief, that each of the said plaintiffs expended the sum of $5.75 in and about and as the costs and expenses of filing said lien.

19.

That on or about the 1st day of August, 1893, the defendant William H. Merritt entered into a contract with the defendant Rosa Herzman to do certain labor upon and to furnish certain materials for the erection of a building upon lot six (6), in block five (5), hereinbefore in paragraph 9 hereof described, and he thereafter did such labor upon and furnished such material for such building ; that in so doing the said Merritt contracted with the plaintiffs Hance Bros. and with Wheaton, Reynolds & Co. and with S. F. Remer, as the Remer Roofing Co., and others of the parties to this action for certain labor and materials for said building, as hereinbefore set forth ; that said labor and materials were in all regards done and furnished, as required by the provisions of said contracts, on or before November 29th, 1893 ; that said defendant, Rosa Herzman, did not pay said Merritt or the said parties for the said labor and materials ;

that thereafter, on or about the 3rd day of February, 1894, the defendant William H. Merritt, for the purpose of securing and perfecting a lien for the moneys so due him and the said parties
14 and others hereinbefore referred to, as aforesaid, upon the land and building hereinbefore described, under the provisions of the mechanics' lien law of the State of North Dakota, filed in the office of the clerk of the district court in and for said Cass county a just and true account of the demand due to him (including the amounts due the parties hereinbefore in this paragraph referred to) after allowing all credits, and containing a correct description of the property to be charged therewith and verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract made as required by law; that the said demands of the said parties so embraced in the lien filed, as hereinbefore shown, by said William H. Merritt have never been paid to said Merritt or to any other person for the benefit of the persons entitled thereto, except as hereinbefore shown.

20.

Upon information and belief, that the said defendants, William H. Merritt, The Red River Valley National Bank of Fargo, James A. Chesley, and The Beidler-Robinson Lumber Co., each have or claim to have some right, title, claim, or lien to or upon the lands and buildings hereinbefore in this complaint described, but that the same are junior and inferior to the claim and lien of the plaintiff thereto, except that the claim of said Red River Valley National Bank of Fargo may be senior and superior to the claim and liens of the plaintiffs or some of them upon the lot described in paragraph 9 of this complaint.

21.

That the building so built upon lot six (6), in block five (5), and hereinbefore in this complaint referred to, and upon which the plaintiffs hold liens, as hereinbefore shown, is a two-story brick store building, with basement, and enclosed on each side with party walls, and that the same cannot be removed from said lot unless said building be first torn down and destroyed; and upon information and belief, that it would be for the best interest of all parties that said lot and the improvements thereon should be sold together and an
15 account taken of the moneys so realized, and the separate values of said lot and the building and other improvements thereon to be ascertained and the proceeds of such sale distributed according to the provisions of the statute in such cases made and provided.

Wherefore the plaintiffs demand judgment as follows:

1.

Against said Rosa Herzman personally: In favor of the plaintiff Archibald J. Craig for said sum of $285.00, together with the interest thereon since November 2nd, 1893, less said sum of $15.10

paid thereon; in favor of the plaintiff The Menomonie Hydraulic Press Brick Co. for the sum of $70.00, together with the interest thereon since October 13th, 1893, less said sum of $3 34; in favor of the plaintiff F. X. Goulet for said sum of $213.26 and interest thereon since September 20th, 1893, less $25.00 and $11.30 paid thereon; in favor of the plaintiffs Hance Bros. for said sum of $67.06 and the interest thereon since November 17th, 1893, less the sum of $3.55; in favor of the plaintiff The Fargo Gas & Electric Co. for said sum of $72.90, together with the interest thereon since December 31st, 1893; in favor of the plaintiff Henry E. Magill for the said sum of $372.73, together with the interest thereon since October 12th, 1893, less $19.72 paid thereon; in favor of the plaintiff S. F. Remer for said sum of $102.00, together with the interest thereon since November 11th, 1893, less the sum of $5.40 paid thereon; in favor of the plaintiff Gruber & Co. for said sum of $32.00, together with the interest thereon since November 2nd, 1893.

2.

Adjudging and decreeing the several amounts of said claims to be a first and prior lien against and upon the said building and improvements upon said lot six (6), in block five (5), hereinbefore in paragraph 9 of this complaint described, in the order in which said claims and liens were filed in the office of the clerk of the court, in favor of the plaintiff to whom said amount is found to be due
16 and against such interest in *in* said lot as may be ascertained to be liable therefor; that said Hance Bros. and Henry E. Magill, S. F. Remer, and other parties hereto so entitled be adjudged to be entitled to the advantages, benefits, and security of the said lien hereinbefore in paragraph 19 alleged to have been filed by said William H. Merritt, including their accounts, and that their said lien may take precedence according to the right secured by the filing of said lien by said Merritt, as well as by themselves, as hereinbefore shown.

3.

Ordering and directing that the said lot and building be sold in the manner and after the notice provided by law for the sale of real property upon execution, and that the moneys so received may be divided among the plaintiffs and other parties interested in said lot and building according to their respective rights thereto.

4.

For such other and further relief as to the court may seem just, together with the costs and disbursements of this action.

NEWTON & SMITH,
Attorneys for the Plaintiffs Archibald J. Craig, F. X. Goulet, Hance Bros., Henry E. Magill, S. F. Remer, and Gruber & Co.

BENTON, LOVELL & BRADLEY,
Attorneys for Plaintiffs Menomonie Hydraulic Press Brick Co. and Fargo Gas & Electric Co.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Geo. W. Newton, first being duly sworn, on oath says that he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the con-
17 tents thereof, and that the same is true according to his best knowledge, information, and belief.

GEO. W. NEWTON.

Subscribed and sworn to before me this 15th day of November, 1898.

EMERSON H. SMITH,
[SEAL.] *Notary Public, Cass Co., N. Dak.*

To the defendants William H. Merritt, The Red River Valley National Bank of Fargo, James A. Chesley, and The Beidler-Robinson Lumber Co.:

You are each hereby notified that no personal claim is made against you, and that the general object of the action is as set forth in the foregoing complaint and demand of judgment, and that the property affected by said action is lot six (6), in block five (5), of the original town site of the city of Fargo.

NEWTON & SMITH,
Attorneys for the Plaintiffs Archibald J. Craig, F. X. Goulet, Hance Bros., Henry E. Magill, S. F. Remer, and Gruber & Co.
BENTON, LOVELL & BRADLEY,
Attorneys for the Plaintiffs Menomonie Hydraulic Press Brick Co. and Fargo Gas & Electric Co.

(Endorsements:) Summons, complaint, and notice of no personal claim. Received for service Nov. 16, 1898. Chas. E. Wilson, sheriff, Cass county, N. D., by H. J. Hanson, deputy. Filed in the office of clerk of district court, Cass Co., N. D., Jan. 27, 1899. E. M. Patton, clerk.

18 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward H. Hance, Late Partners as Hance Bros.; Gargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co, Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALley National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

The defendant The Red River Valley National Bank of Fargo for its separate answer to the complaint in the above-entitled action admits the allegations of said complaint contained in paragraphs numbered 1 to 8, inclusive, thereof.

This defendant further admits that during all the times in said complaint mentioned up to the 17th day of May, A. D. 1895, the defendant Rosa Herzman was the owner of the premises described in said complaint.

Further answering and as to the other allegations of said complaint contained in paragraphs numbered 9 to 19, both inclusive, this defendant alleges that it has no knowledge or information sufficient to form a belief, and therefore denies the same.

Further answering, this defendant alleges that on the 8th day of July, A. D. 1884, one George Cooper, being then the owner of the premises described in the complaint, together with his wife, Alvira Cooper, then and there duly made and executed and delivered to the Travelers' Insurance Company of Hartford, Connecticut, their certain mortgage upon said premises to secure the payment of the sum of three thousand dollars ($3,000) then owing by said
19 George Cooper to said The Travelers' Insurance Company of Hartford, Connecticut; which said mortgage was duly filed for record in the office of the register of deeds of Cass county, in the Territory of Dakota, now State of North Dakota, on the 19th day of July, A. D. 1884, and was recorded in Book U of Mortgages, at page 341.

That thereafter and on the 7th day of May, A. D. 1894, the said mortgage remaining unpaid and unsatisfied, and there being at that time due thereon to the mortgagee above named upwards of three thousand dollars, pursuant to proceedings duly had under the laws of this State with reference to the foreclosure of mortgages by advertisement and by virtue of the power of sale in said mortgage contained, the said premises were sold at foreclosure sale under said mortgage by the sheriff of said Cass county, and that the same were purchased at said sale by the mortgagee therein named, said The Travelers' Insurance Company of Hartford, Connecticut, for the sum

of three thousand one hundred and eleven dollars and fifteen cents ($3,111.15), and that on said 7th day of May a certificate of the sale under said foreclosure proceedings was duly executed and delivered to said purchaser by the sheriff of said Cass county; which said certificate of sale was thereafter and on the 15th day of May, 1894, duly filed in the office of the register of deeds of said Cass county, and was recorded in Book 53 of Mortgages, on pages 341 and 342.

That thereafter and on the 12th day of January, 1895, for valuable consideration paid to said The Travelers' Insurance Company by this defendant, the said The Travelers' Insurance Company, by an instrument in writing, duly executed and delivered to this defendant, then and there sold, assigned, transferred, and set over to this defendant all the right, title, and interest of said The Travelers' Insurance Company in and to said sheriff's certificate of sale of the premises therein described.

That no redemption from said foreclosure sale was made, and that thereafter and on the 17th day of May, 1895, this defendant, being then the owner of said sheriff's certificate of sale, caused to be made and executed and delivered pursuant to the statute in such case made and provided a sheriff's deed to said premises; which said deed was duly filed for record in the office of the register of deeds of said Cass county on the 22nd day of July, A. D. 1898, and was duly recorded in Book 38 of Mortgages, on page 357.

That this defendant has been the owner and in possession of said premises since the said 17th day of May, 1895.

Further answering, this defendant alleges that during the fall and winter of the year 1893–1894 and while the said premises were owned by and in the possession of said defendant, Rosa Herzman, there was constructed upon said premises a two story solid brick building, which building was, as this defendant is informed and believes, so constructed by the defendant William H. Merritt under a contract with said defendant, Herzman; that in the construction of said building the said Herzman entered into agreements with the owners of the real property adjoining said premises on the west and east sides thereof, said owners being, as defendant is informed and believes, one C. A. Hallenberg and one John H. Forsyth, the said Hellenberg and Forsyth being then engaged in the construction of brick buildings upon said adjoining lots, and that by said agreements it was provided that the party walls between the buildings of said Hallenberg and Forsyth and the building of said Herzman should be jointly constructed, said walls to rest in equal proportion upon the properties of the three several owners; that therefore the said C. A. Hellenberg is the joint owner with this defendant of the entire east wall of the building situated upon the premises described in said complaint, and that John H. Forsyth is the joint owner with this defendant of the entire west wall of the building situated upon the premises described in said complaint; that said building is otherwise constructed upon substantial foundations, and that the removal of the same could only be done by demolishing the entire

building, and, further, be a serious and permanent injury to
21 the adjoining property-owners and to their realty.

Wherefore this defendant prays that a decree of this court be made and entered decreeing and adjudging that the liens of the plaintiffs, if the same shall be established by due proof herein, are inferior to the rights of this defendant, and that so far as this defendant is concerned the said complaint be dismissed, and that this defendant have judgment against the plaintiffs for its costs and disbursements herein.

JOHN E. GREENE,
Attorney for Defendant The Red River Valley Nat'l Bank of Fargo.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

John W. von Nieda, being first duly sworn, says that he is the president of the defendant The Red River Valley National Bank of Fargo; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his best knowledge, information, and belief.

JOHN W. VON NIEDA.

Subscribed and sworn to before me this 6th day of January, A. D. 1899.

JAMES E. HYDE,
[SEAL.] *Notary Public, Cass County, N. D.*

(Endorsement:) Filed in the office of clerk of district court, Cass Co., N. D., Jan. 27, 1899. E. M. Patton, clerk.

22 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

Affidavit of Default.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Geo. W. Newton, being first duly sworn, on oath says that he is a member of the firm of Newton & Smith, attorneys for some of the

plaintiffs in the above-entitled action and the attorneys
in the summons in said action as the attorneys upon wh
defendants were by said summons required to serve their a
that the said summons and complaint was duly served u
said defendants, Rosa Herzman and James A. Chesley,
ally upon the 18th day of November, 1898, by the sheriff
county, North Dakota, and upon the said defendant, Willi
Merritt, personally upon the 23rd day of November, 1898,
sheriff, and upon said defendant, The Beidler-Robinson L
Company, a corporation, personally upon the 17th day of Dec
1898, by the sheriff of Traill county, North Dakota, as appears
original summons and the said sheriff's returns in each of t
going instances attached thereto and filed with said summon
more than thirty days have elapsed since the date of said
upon said defendants respectively, and that none of s
23 fendants or any person or persons in their behalf hav
or served upon affiant's firm or otherwise, to affiant's
edge, any notice of appearance in said action or made or
upon affiant's said firm any answer or demurrer therein, a
said defendants are each and all wholly in default in said ac

GEO. W. NEWT

Subscribed and sworn to before me this 1st day of May, 18

EMERSON H. SMITH

[SEAL.] *Notary Public, Cass Co., N.*

(Endorsement:) Filed in the office of clerk of district cou
Co., N. Dak., May 8, 1899. E. M. Patton, clerk. W. A.
deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK
a Corporation; F. X. Goulet, Horace Hance and Edwar
Hance, Late Partners as Hance Bros.; Fargo Gas & Ele
Co., a Corporation; Henry E. Magill, S. F. Remer, as Re
Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gru
as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER V
ley National Bank of Fargo, a Corporation; James Che
and The Beidler-Robinson Lumber Co., a Corporation, Def
ants.

STATE OF NORTH DAKOTA, } *ss:*
County of Cass, }

C. L. Bradley, being first duly sworn, says that he is one
attorneys for the plaintiffs in the above-entitled actio
24 that the statements of costs and disbursements given
is just and correct, and that the same and each item t

has been or necessarily will be incurred in the prosecution of said action.

C. L. BRADLEY.

Subscribed and sworn to before me this 5th day of May, 1899.

GUY L. WALLACE,
[SEAL.] *Notary Public, Cass Co., N. D.*

Statement of Costs and Disbursements.

Statutory costs:

Before notice of trial	10.
After notice of trial	3.
Trial fee	5.
Additional defendants—four	4.
Sheriff's fees	9.50
Clerk's fees	5.
Notary's fees	.75

Witness fees:

W. H. Merritt, 1 day, 1 mile	1.10
W. A. Brown, 1 day, 1 mile	1.10
	$39.45

Costs Taxable in Favor of Individual Defendants.

Archibald J. Craig:

Drawing lien	5.
Filing lien	.75
Under sec. 5577, Code	14.26
	$20.01

Menomonie Hydraulic Press Brick Co.:

Drawing lien	5.
Filing lien	.75
Under sec. 5577, Code	4.90
	$10.65

25 F. X. Goulet:

Drawing lien	5.
Filing lien	.75
Under sec. 5577 Code	12.96
	$18.71

Hance Bros.:

Drawing lien	5.
Filing lien	.75
Under sec 5577 Code	4.62
	$10.37

Fargo Gas & Electric Co.:

Drawing lien	5.
Filing lien	.75
Under sec. 5577 Code	5.33
	$11.08

Henry E. Magill:

Drawing lien	5.
Filing lien	.75
Under sec. 5577 Code	25.75
	$31.50

Remer Roofing Co.:

Drawing lien	5.
Filing lien	.75
Under sec. 5577 Code	7.18
	$12.93

Gruber & Co.:

Drawing lien	5.
Filing lien	.75
Under sec. 5577 Code	
	$5.75

The foregoing bill of costs and disbursements is hereby taxed and allowed, as hereinbefore stated and set forth, this 8th day of May, 1899.

E. M. PATTON, *Clerk.*

26 Attorneys for defendant Red River Valley National Bank of Fargo agree that costs may be taxed in accordance with the foregoing statement.

MILLS, GREENE & RESSER,
Attorneys for said Bank.

Statement of Costs to be Taxed in Favor of Each Plaintiff, Taxing in Favor of Each His Pro Rata Share of the General Costs.

		Individual costs.	General costs.
Archibald J. Craig	$27.30	$20.01	$7.29
Menomonie Hydraulic Press Brick Co.	13.24	10.65	2.59
F. X. Goulet	25.30	18.71	6.59
Hance Bros.	12.72	10.37	2.35
Fargo Gas & Elec. Co.	13.79	11.08	2.71
Henry E. Magill	44.62	31.50	13.12
Remer Roofing Co.	16.55	12.93	3.62
Gruber & Co.	6.93	5.75	1.18
Total	$160.45		

(Endorsements:) Taxation of costs. Filed in the office of the clerk of district court, Cass Co., N. Dak., May 8, 1899. E. M. Patton, clerk. W. A. Brown, deputy.

27 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Carporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

To Messrs. Mills, Greene & Resser, attorneys for the defendant, The Red River Valley National Bank of Fargo.

GENTLEMEN: Please take notice that the undersigned, as attorneys for the plaintiffs in the above-entitled action, will move the court, at the judge's chambers, in the court-house, in the city of Fargo, on Saturday, May 6th, 1899, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, to settle and sign the findings of fact and conclusions of law in said action, a copy of which, as proposed by the plaintiffs, is herewith served upon you.

Dated May 3rd, 1899.

Yours, etc., NEWTON & SMITH,
BENTON, LOVELL & BRADLEY,
Attorneys for the Plaintiffs.

Service of the within proposed findings of fact and conclusions of law is hereby admitted by copy received this 3rd day of May, 1899, at Fargo, N. D.

MILLS, GREENE & RESSER,
Attorneys for the Defendant The Red River Valley Nat'l Bank.

28 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Reemer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

The above-entitled action being regularly on the calendar of the above-entitled court and duly noticed for trial and coming on to be heard before the court without a jury on the 29th day of March, 1899, upon a summons duly served upon each and all of the defendants, and the plaintiffs' complaint duly filed, and the answer of the defendant The Red River Valley National Bank of Fargo, a corporation, duly served and filed, each and all of the other defendants being wholly in default, the plaintiffs in said action appearing by Messrs. Newton & Smith and Be-ton, Lovell & Bradley, and the defendant which had answered, The Red River Valley National Bank, by John E. Greene, Esq., and Messrs. Mills, Greene & Resser, and the evidence of the respective parties having been submitted and the counsel for said parties having been heard, and thereupon the court, reserving his decision, thereafter, on the 24th day of April, 1899, after having considered the evidence produced and arguments of counsel, finding and deciding favorably to the contention of the plaintiffs in said action and directing findings of fact and conclusions of law to be made accordingly, therefore now makes the following—

29 *Findings of Fact.*

1.

That on the 8th day of July, 1884, Elvira Cooper was the owner of the premises described in the complaint, viz., lot six (6), in block five (5), of the original town site of Fargo, Cass county, N. D., and that on said day the said Elvira Cooper and her husband executed to the Travelers' Insurance Company of Hartford, Connecticut, a mortgage upon said premises, together with certain other premises within the city of Fargo, to secure an indebtedness of $3,000.00, which said mortgage was duly filed for record in the office of the register of deeds of Cass county, in the Territory of Dakota, now State of North Dakota, on the 19th day of July, A. D. 1884, and was recorded in Book "U" of Mortgages, at page 341; that thereafter and prior to the 1st day of January, 1893, the said premises were

duly sold and conveyed to the defendant Rosa Herzman, subject to said mortgage, and that said Rosa Herzman remained the owner of said premises until the foreclosure of said mortgage, as hereinafter set forth.

2.

That on the 7th day of May, 1894, the premises in the complaint described were sold by the sheriff of Cass county to the Travelers' Insurance Company of Hartford, Connecticut, under proceedings duly had by advertisement for the foreclosure of said mortgage upon said premises, and were purchased by said mortgagee for the sum of three thousand one hundred and eleven and $\frac{15}{100}$ dollars ($3,111.15); that thereafter and on the 12th day of January, 1895, for a good and sufficient consideration, the certificate of sale issued to the said insurance company upon the purchase of said premises at said foreclosure was duly assigned to the defendant The Red River Valley National Bank of Fargo; that no redemption from said foreclosure sale was made, and that thereafter, on the 17th day of May, 1895, a sheriff's deed of said premises described in the complaint was issued by the sheriff of Cass county to the defendant The Red River Valley National Bank of Fargo, and that the said Red River Valley National Bank of Fargo has ever since held the title thereby acquired of said premises.

3.

That at the time of giving said mortgage hereinbefore mentioned and until about the 7th day of June, 1893, there was situated upon the premises described in the complaint a two-story frame building, 140 feet long and 25 feet wide, and that said building was destroyed by fire on said last-named date, and that thereafter and before the 3rd day of February, 1894, the defendant Rosa Herzman, the then owner of said lot six (6), in block five (5), of the original town site of the city of Fargo, and hereinbefore described, erected upon said lot a new two-story, with a basement, brick building, and that the same since said time has and still is standing thereon.

4.

That on or about the 2nd day of October, 1893, the plaintiff Archibald J. Craig and the defendant Rosa Herzman entered into an agreement whereby the said plaintiff contracted to provide certain labor and materials and to erect and complete a heating plant within and for the new two-story brick building hereinbefore in paragraph 3 described, and that therefor the said Rosa Herzman agreed to pay said plaintiff the sum of four hundred eighty-five dollars ($485.00), as follows, to wit, $200.00 when all material was on the ground, $100.00 November 1st, and the balance November 20th, 1893; that said plaintiff fully kept and performed his said agreement and completed said heating plant on or before the 2nd day of November, 1893; that the said Rosa paid the said plaintiff towards the contract price of said heating plant, October 28th, 1893, the sum of $125.00 and on November 1st, 1893, the further sum of

$75.00; that thereafter, on November 20th, 1893, at 4.30 o'clock p. m. the said plaintiff, Craig, for the purpose of securing and perfecting a lien for the balance of the money so due him, as aforesaid, under said contract upon the building and lot hereinbefore described
31 under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that thereafter, upon, to wit, the 26th day of December, 1893, the said defendant, Rosa Herzman, paid the plaintiff the further sum of $75.00 and the sum of $15.10 as a dividend from her assigned estate upon said date; that there is now due and unpaid the sum of one hundred ninety-four and $\frac{90}{100}$ dollars ($194.90), and the interest thereon, at the rate of seven per cent. per annum, from the 26th day of November, 1893, down to the 3rd day of May, 1899, amounting to the sum of seventy-two and $\frac{88}{100}$ dollars ($72.88), and that the total amount now due and unpaid of principal and interest from the defendant Rosa to this plaintiff under said contract is the sum of two hundred sixty-seven and $\frac{88}{100}$ — ($267.88); that Exhibits "A" and "B" attached to the stipulation dated February 8th, 1899 and filed herein are the original contract and a copy of the claim of lien respectively hereinbefore in this paragraph referred to.

5.

That the Northern Hydraulic Press Brick Co. (to whose interest the plaintiff The Menomonie Hydraulic Press Brick Co., a corporation, has succeeded) furnished certain pressed brick for the new two-story brick building hereinbefore in paragraph 3 described in the summer and fall of 1893 under a contract with one L Johnson, who was at said time doing labor and furnishing material for said building by virtue of and under a contract with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and
32 furnish certain material and erect certain parts of said new two-story brick building hereinbefore mentioned, and that said Johnson and the said Merritt performed each respectively his said contract, and in so doing used the bricks so furnished by said Northern Hydraulic Press Brick Co. hereinbefore mentioned; that the value of said bricks amounted to the sum of $70.00 October 13th, 1893, at which date the last delivery thereof was made; that thereafter, on the 14th day of December, 1893, at 5.50 o'clock p. m., the said Northern Hydraulic Press Brick Co., for the purpose of securing and perfecting a lien for the money so due it, as aforesaid, under said contract upon the building and lot hereinbefore described under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building

are situated, a just and true account of said demand after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said district court and an abstract thereof made, as required by law; that no part of said sum of $70.00 has been paid, except the sum of $3.34, paid thereon on the 14th day of December, 1893, as a dividend from said Rosa's assigned estate; that there is now due and unpaid the sum of $66.66 and the interest thereon, at the rate of seven per cent. per annum, from the 14th day of December, 1893, down to the 3rd day of May, 1899, amounting to the sum of $25.08, and that the total amount now due and unpaid of principal and interest to this plaintiff under said contract is the sum of $91.74, and that Exhibit "C" attached to the stipulation dated February 8th, 1899, and filed herein is a copy of the claim of lien hereinbefore in this paragraph referred to.

6.

That the plaintiff F. X. Goulet furnished 89 M bricks for the new two-story brick building hereinbefore in paragraph 3 described in the summer and fall of 1893 under a contract with the
33 defendant Rosa Herzman therefor; that the said bricks were used in the said building, and the agreed price thereof was $6.00 per M and amounted to the sum of $534.00; that the delivery of said bricks was completed September 20th, 1893, at which date the last delivery was made; that from time to time prior to September 20th, 1893, said Rosa paid sundry sums thereon amounting to $320.74 September 20th, 1893, leaving a balance then unpaid of $213.26; that thereafter, on the 19th day of December, 1893, at 3.30 o'clock p. m., the said plaintiff, Goulet, for the purpose of securing and perfecting a lien for the balance of the money so due him as aforesaid under said contract upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien, and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law; that thereafter, on, to wit, the 5th day of January, 1894, the said defendant, Rosa Herzman, paid the plaintiff the further sum of $25.00 and the sum of $11.30 as a dividend from her assigned estate upon said date; that there is now due and unpaid the sum of $176.96 and the interest thereon, at the rate of seven per cent. per annum, from the 5th day of January, 1894, down to the 3rd day of May, 1899, amounting to the sum of $66.15, and that the total amount now due and unpaid of principal and interest from the defendant Rosa to this plaintiff, under said contract, is the sum of $243.11; that Exhibit "D," attached to the stipulation dated February 8th, 1899, and filed

herein, is a copy of the claim of lien hereinbefore in this paragraph referred to.

7.

That the plaintiffs Hance Bros. furnished certain hard-
34 ware for the new two-story brick building hereinbefore in paragraph 3 described in the summer and fall of 1893 under a contract therefor with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and furnish certain materials and erect certain parts of said new two-story brick building; that said Merritt performed his said contract, and in so doing used the hardware furnished by these plaintiffs; that the value of said hardware was the sum of $67.06 on November 17th, 1893, at which date the last delivery thereof was made; that thereafter, on the 12th day of January, 1894, at 5:30 o'clock p. m., said plaintiffs, Hance Bros., for the purpose of securing and perfecting a lien for the balance of the money so due them as aforesaid under said contract, upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien, and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law; that thereafter, upon, to wit, the 12th day of January, 1894, the said defendant, Rosa Herzman, paid the plaintiffs the sum of $3.94, as a dividend from her assigned estate; that there is now due and unpaid the sum of $63.12 and the interest thereon, at the rate of seven per cent. per annum, from the 12th day of January, 1894, down to the 3rd day of May, 1899, amounting to the sum of $23.75, and that the total amount now due and unpaid of principal and interest to these plaintiffs under said contract is the sum of $86.47; that Exhibit "E," attached to the stipulation dated February 8th, 1899, and filed herein, is a copy of the claim of lien in this paragraph referred to.

35 8.

That the plaintiff The Fargo Gas & Electric Co. furnished certain labor and materials for the new two-story brick building hereinbefore in paragraph 3 described in the summer and fall of 1893, under a contract with the defendant Rosa Herzman, the then owner of said lot, therefor; that the said materials were used in said building, and that the value thereof was the sum of $72.90; that the last of said labor and material was furnished on the 31st day of December, 1893; that thereafter, on the 13th day of January, 1894, at 5 o'clock p. m., the said plaintiff, Fargo Gas & Electric Co., for the purpose of securing and perfecting a lien for the money so due it as aforesaid, under said contract, upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State

of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien, and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law; that there is now due and unpaid the sum of $72.90 and the interest thereon, at the rate of seven per cent. per annum, from the 13th day of January, 1894, down to the 3rd day of May, 1899, amounting to the sum of $27.06, and that the total amount now due and unpaid of principal and interest from the defendant Rosa to this plaintiff under said contract is the sum of $99.96; that Exhibit "F," attached to the stipulation dated February 8th, 1899, and filed herein, is a copy of the claim in this paragraph referred to.

9.

That Wheaton, Reynolds & Co. furnished certain mill-work, fixtures and material, sash, doors, etc., for the new two-story brick building hereinbefore described in paragraph 3 in the summer
36 and fall of 1893, under a contract therefor with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and furnish certain material and erect certain parts of said new two-story brick building; that said Merritt performed his said contract, and in so doing used the mill-work, fixtures, material, sash, doors, etc., furnished by said Wheaton, Reynolds & Co.; that the value of said mill-work, fixtures, material, sash, doors, etc., was the sum of $372.73 on October 15th, 1893, at which date the last delivery thereof was made; that thereafter, on the 16th day of January, 1894, at 9.15 o'clock, a. m., said Wheaton, Reynolds & Co., for the purpose of securing and perfecting a lien for the balance of the money so due them as aforesaid, under said contract, upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien, and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court, and an abstract thereof made as required by law; that thereafter, on, to wit, the 16th day of January, 1894, the said defendant, Rosa Herzman, paid said Wheaton, Reynolds & Co. the sum of $19.72 as a dividend from her assigned estate; that there is now due and unpaid the sum of $353.01 and the interest thereon, at the rate of seven per cent. per annum, from the 16th day of January, 1894, down to the 3rd day of May, 1899, amounting to the sum of $130.71, and that the total amount now due and unpaid of principal and interest upon said claim under said contract is the sum of $483.73; that on the 15th day of April, 1897, the said Wheaton, Reynolds & Co. duly made an assignment of all their property and

estate, including said claim of indebtedness and lien hereinbefore in this paragraph mentioned, under the laws of the State of Min-
37 nesota, where they then lived and were doing business, to one Walter A. Eggleston, for the benefit of their creditors, and that said Eggleston accepted said trust and duly qualified therein, and that thereafter the said Walter A. Eggleston, as such assignee, duly assigned to the plaintiff Henry E. Magill the said indebtedness and all liens securing the same; that the said Henry E. Magill is now the owner of said lien and indebtedness and all liens securing the same; that Exhibits "G," "H," and "I," attached to the stipulation dated February 8th, 1899, and filed herein, are copies respectively of said claim of lien, assignment to Walter A. Eggleston, and assignment to Henry E. Magill, in this paragraph referred to.

10.

That the plaintiff S. F. Remer, as the Remer Roofing Co., furnished certain roofing, skylight, curb and other fixtures, labor, and material for the new two-story brick-building hereinbefore, in paragraph 3, described, in the summer and fall of 1893, under a contract therefor with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and furnish certain materials and erect certain parts of said new two-story brick building; that said Merritt performed his said contract and in so doing used the roofing, skylight, curb and other fixtures, labor, and material furnished by this plaintiff; that the value of said roofing, skylight, curb and other fixtures, labor, and materials was the sum of $134.00 on the 11th day of November, 1893, at which date the last delivery thereof was made; that thereafter, on the 17th day of January, 1894, at 10.12 o'clock a. m., the said plaintiff, S. F. Remer, as the Remer Roofing Co., for the purpose of securing and perfecting a lien for the money so due him as aforesaid under said contract upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said
38 lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien, and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that thereafter, upon, to wit, the 4th day of November, 1893, the said defendant, Rosa Herzman, paid the plaintiff the sum of $7.00, and on the 29th day of December, 1893, the further sum of $25.00, and on the 17th day of January, 1894, the sum of $4.50, as a dividend from her assigned estate; that there is now due and unpaid the sum of $97.50 and the interest thereon, at the rate of seven per cent. per annum, from the 17th day of January, 1894, down to the 3rd day of May, 1899, amounting to the sum of $36.06, and that the total amount now due and unpaid of principal and interest to this plaintiff under said con-

tract is the sum of $133.56; that Exhibit "J," attached to the stipulation dated February 8th, 1899, and filed herein, is a copy of the claim of lien in this paragraph referred to.

11.

That the plaintiff Fargo Tile Walk Co. (now known as Gruber & Co.) furnished certain labor and material and laid and built a concrete walk and curbing in front of and adjacent to the new two-story brick building hereinbefore, in paragraph 3, described, in the summer and fall of 1893, under a contract with the defendant Rosa Herzman, the then owner *owner* of said lot, therefor, at the agreed price of $82.00; that the last of said labor and material was furnished on the 25th day of November, 1893, at which date said walk and curbing were completed; that on said 25th day of November, 1893, the said defendant, Rosa Herzman, paid upon said indebtedness the sum of $50.00; that the balance then due was the sum of $32.00; that thereafter, on the 2nd day of February, 1894, at 9 o'clock a. m., the said Fargo Tile Walk Co. (now known as Gruber & Co.), for the purpose of securing and perfecting a lien for the money so due it as aforesaid under said contract upon the
39 building and lot hereinbefore described and the walk hereinbefore in this paragraph described under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that there is now due and unpaid the sum of $32.00 and the interest thereon, at the rate of seven per cent. per annum, from the 2nd day of February, 1894, down to the 3rd day of May, 1899, amounting to the sum of $11.90, and that the total amount now due and unpaid of principal and interest from the defendant Rosa to this plaintiff under said contract is the sum of $43.90; that Exhibit "K," attached to the stipulation dated February 8th, 1899, and filed herein, is a copy of the claim of lien in this paragraph referred to.

12.

That the defendant Rosa Herzman at the completion by the said defendant, William H. Merritt, of his said contract with her, as hereinbefore in these findings shown, failed and neglected to pay to said Merritt or to any person or persons in his behalf the balance of about $1,065.81 then due him under his said contract with said Rosa, and that thereupon, on, to wit, the 3rd day of February, 1894, at 5 o'clock p. m., the said defendant, Merritt, for the purpose of securing and perfecting a lien for the balance of the money so due him, as aforesaid, under said contract upon the building and lot hereinbefore described under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the dis-

trict court for said Cass county, wherein *in* said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that the amount embraced within and covered by said claim of lien filed by said William H. Merritt included the amount hereinbefore shown to be due and unpaid to the plaintiffs Hance Bros., Henry E. Magill, and S. F. Remer, and that to the extent of the amount of the claims of said Hance Bros., Henry E. Magill, and S. F. Remer the said defendant, Rosa Herzman, has never paid the said William H. Merritt or any person or persons for him or on his account; that Exhibit "7" filed herein is a copy of the claim of lien in this paragraph referred to.

13.

That the east wall of said new two-story brick building is a party wall and stands equally upon lots five and six, in block five, of said original town site of the city of Fargo, and that the same was so built in the summer and fall of 1893 and made by a written agreement between said Rosa Herzman and the owner of said lot five, and that the west wall of said new two-story brick building is a party wall standing wholly upon lot No. 7, in said block five, of the original town site of the city of Fargo, and was so built in the summer and fall of 1893 and made in pursuance of a written agreement between said Rosa Herzman and the owner of said lot seven, and that the building in question and the buildings on either side, east and west, constitute a solid row of three brick buildings, belonging to different owners, and that the building in question is incapable of being removed from the said lot unless it be first torn down.

14.

That it would be for the best interests of all parties hereto that said land, viz., lot six (6), in block five (5), and the improvements thereon should be sold together; that the said lot and the said improvements are of equal value, and that each is at least of
41 the value of two thousand five hundred dollars ($2,500.00), and that all of the allegations of the complaint are true, except as otherwise shown by these findings, and therefrom the following:

Conclusions of Law.

1.

That there is now due and unpaid to the plaintiff Archibald J. Craig the sum of $267.88, for which sum he is entitled to judgment against said Rosa Herzman and establishing a lien upon the said lot and improvements, as hereinafter shown.

2.

That there is now due and unpaid to the plaintiff The Menomonie Hydraulic Press Brick Co. the sum of $91.74, for which sum it is entitled to judgment establishing a lien upon the said lot and improvements, as hereinafter shown.

3.

That there is now due and unpaid to the plaintiff F. X. Goulet the sum of $243.11, for which sum he is entitled to judgment against said Rosa Herzman and establishing a lien upon the said lot and improvements, as hereinafter shown.

4.

That there is now due and unpaid to the plaintiffs Hance Bros. the sum of $86.47, for which sum they are entitled to judgment establishing a lien upon the said lot and improvements, as hereinafter shown.

5.

That there is now due and unpaid to the plaintiff The Fargo Gas & Electric Co. the sum of $99.96, for which sum it is entitled to judgment against said Rosa Herzman and establishing a lien upon the said lot and improvements, as hereinafter shown.

6.

That there is now due and unpaid to the plaintiff Henry E. Magill the sum of $483.73, for which sum he is entitled to judgment establishing a lien upon the said lot and improvements, as hereinafter shown.

7.

42 That there is now due and unpaid to the plaintiff S. F. Remer the sum of $133.56, for which sum he is entitled to judgment establishing a lien upon the said lot and improvements, as hereinafter shown.

8.

That there is now due and unpaid to the plaintiffs Gruber & Co. the sum of $43.90, for which sum, together with costs, they are entitled to judgment against said Rosa Herzman and establishing a lien upon said lot and improvements, as hereinafter shown.

But it is hereby stipulated between counsel of the respective parties that a decision by the supreme court that this conclusion of law is erroneous in the particular that said plaintiffs have not a lien upon said lot and improvements and the accompanying result upon the other conclusions of law herein and the final judgment ordered by the supreme court shall not entitle the appellant to a recovery

of costs upon the appeal nor deprive the respondent of recovery of costs thereon.

NEWTON & SMITH, *Attorneys for the Plaintiffs.*
BENTON, LOVELL & BRADLEY,
Attorneys for the Plaintiffs.
MILLS, GREENE & RESSER,
Attorneys for the Defendant The Red River Valley National Bank of Fargo.

9.

That the said sums so found due and unpaid to the plaintiffs above named are each hereby adjudged to be and constitute a first and prior lien in the order hereinbefore stated upon said new two-story brick building hereinbefore described and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15.

43

10.

That each of the said plaintiffs hereinbefore named, in addition to the judgment hereinbefore directed, is entitled to recover his or its *pro rata* share of the costs and disbursements of this action, taxable under sections 5575 and 5578 of Revised Codes, including statutory costs of $5.00 for drawing his or its claim of lien and seventy-five cents clerk's fees for filing the same.

11.

That each and all the plaintiffs are entitled to judgment adjudging and directing that unless the defendant The Red River Valley National Bank of Fargo, on or before thirty days from and after the day of service of a copy of the final judgment herein upon it, pay or cause to be paid the said judgments of the plaintiffs, together with the interest thereon to the time of such payment and costs, then that the said lot number six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, together with the improvements and buildings thereon and appurtenances, be sold by or under the direction of the sheriff of said Cass county in the manner and after the notice provided by law for the sale of real property upon execution, and of the moneys therefor received one-half be paid and delivered to the defendant The Red River Valley National Bank of Fargo, and from the other half each of the plaintiffs herein be paid the sum of his or its judgment, together with costs, and thereafter the said Menomonie Hydraulic Press Brick Co. be paid in full with costs, and thereafter the said F. X. Goulet be paid in full with costs, and thereafter the said Hance Bros. be paid in full with costs, and thereafter the said Fargo Gas & Electric Co. be paid in full with costs, and thereafter the said Henry E. Magill be paid in full with costs, and thereafter the said S. F. Remer be paid in full with costs, and thereafter the said Gruber & Co. be paid in full with costs, or in case there shall not be sufficient money received
44 upon said sale to pay all said claims in full, then the same shall be so paid in the order named as fully as the money so

received will pay, and any excess over and above the amount required to pay said judgments and costs be paid and delivered to said Red River Valley national bank, its successors or assigns.

12.

That any party to this action may be a purchaser at said sale, and that the said sheriff report his doing in the premises to the court immediately after said sale, and upon the confirmation of said sale by the court that he make and deliver to the purchaser a deed in due form of said lot and improvements, and that thereafter the title to said lot, improvements, and appurtenances shall vest in and absolutely belong to such purchaser and fully released of and from any and all title, right, claim, and lien of each and all parties hereto.

Let judgment be entered accordingly.

By the court:

CHAS. A. POLLOCK, *Judge.*

Dated this May 3rd, 1899.

(Endorsements:) Original findings of fact and conclusions of law. Filed in the office of clerk of district court, Cass Co., N. Dak., May 10, 1899. E. M. Patton, clerk. W. A. Brown, deputy.

45 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance, and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

Judgment.

The above-entitled action being regularly on the calendar of the above-entitled court and duly noticed for trial and coming on to be heard before the court without a jury on the 29th day of March, 1899, upon the summons duly served upon each and all of the defendants, and the plaintiffs' complaint, duly filed, and the answer of the defendant The Red River Valley National Bank of Fargo, a corporation, duly served and filed, each and all of the other defendants being wholly in default, the plaintiffs in said action appearing by Messrs. Newton & Smith and Benton, Lovell & Bradley, and the defendant The Red River Valley National Bank of Fargo by Messrs. Mills, Greene & Resser, and the evidence of the respective parties having been submitted, and the counsel for said parties having been

heard, and thereupon the court, reserving its decision, thereafter, on the 3rd day of May, 1899, having made and filed findings of fact therein to the effect (1) that on the 8th day of July, 1884, Elvira Cooper was the owner of the premises described in the complaint, viz., lot six (6), in block five (5), in the original town site of
46 Fargo, Cass county, North Dakota, and that on said day the said Elvira Cooper and her husband executed to the Travelers' Insurance Company of Hartford, Connecticut, a mortgage upon said premises to secure an indebtedness of three thousand dollars ($3,000.00), which said mortgage was duly filed for record in the office of the register of deeds of Cass county, in the Territory of Dakota, now State of North Dakota, on the 19th day of July, A. D. 1884, and was recorded in Book "U" of Mortgages, at page 341; that thereafter and prior to the first day of January, 1893, the said premises were duly sold and conveyed to the defendant Rosa Herzman, subject to said mortgage, and that said Rosa Herzman remained the owner of said premises until the foreclosure of said mortgage; and (2) that on the 7th day of May, 1894, said premises were sold by the sheriff of Cass county to the Travelers' Insurance Company of Hartford, Connecticut, under proceedings duly had by advertisement for the foreclosure of said mortgage and were purchased by said mortgagee for the sum of $3,111.15; that thereafter and on the 12th day of January, 1895, for a good and sufficient consideration, the certificate of sale issued to the said insurance company upon the purchase of said premises as said foreclosure was duly assigned to the defendant The Red River Valley National Bank of Fargo; that no redemption from said foreclosure sale was made, and that thereafter, on the 17th day of May, 1895, a sheriff's deed of said premises described in the complaint was issued by the sheriff of Cass county to the said Red River Valley National Bank of Fargo, and that said bank has ever since held the title thereby acquired of said premises; and (3) that at the time of giving said mortgage and until about the 7th day of June, 1893, there was situated upon the premises described in the complaint a two-story frame building, and that said building was destroyed by fire on said last-named date, and that thereafter and before the 3rd day of February, 1894, the defendant Rosa Herzman, the then owner of said lot, erected thereon a new two-story, with a basement, brick building, and that the same since said time has and still is standing thereon;
47 and (4) that on or about the 2nd day of October, 1893, the plaintiff Archibald J. Craig and said Rosa Herzman entered into an agreement whereby the said plaintiff contracted to provide certain labor and materials and to erect and complete a heating plant within and for the said new two-story brick building hereinbefore mentioned, and that therefor the said Rosa agreed to pay to said plaintiff the sum of $485.00, to wit, $200.00 when all material was on the ground, $100.00 November 1st, and the balance November 20th, 1893; that said plaintiff fully kept and performed his said agreement and completed said heating plant on or before the 2nd day of November, 1893; that the said Rosa paid the said plaintiff towards the contract price of said heating plant, October 28th, 1893,

the sum of $125.00, and on November 1st, 1893, the further sum of $75.00, and that thereafter, on November 20th, 1893, at 4.30 o'clock p. m., the said plaintiff, for the purpose of securing and perfecting a lien for the balance of the money so due him, as aforesaid, under said contract upon said building and lot under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that thereafter, upon, to wit, the 26th day of December, 1893, the said defendant, Rosa Herzman, paid the plaintiff the further sum of $75.00 and $15.00, and that the total amount due and unpaid of principal and interest from the defendant Rosa to the plaintiff Craig under said contract on the 3rd day of May, 1893, was and is the sum of two hundred sixty-seven and $\frac{88}{100}$ dollars ($267.88); and (5) that the Northern Hydraulic Press Brick Co. (to whose interest the plaintiff The Menomonie Hydraulic Press Brick Co., a corporation, has succeeded) fur-
48 nished certain pressed bricks for said new two story brick building in the summer and fall of 1893 under a contract with one L. Johnson, who was at said time doing labor and furnishing material for said building by virtue of and under a contract with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and furnish certain materials and erect certain parts of the said new two-story brick building hereinbefore mentioned, and that said Johnson and the defendant Merritt performed each respectively his said contract, and in so doing used the bricks so furnished by said Northern Hydraulic Press Brick Co., and that the value of said bricks amounted to the sum of $70.00 October 13th, 1893, at which date the last delivery thereof was made; that thereafter, on the 14th day of December, 1893, at 5.30 o'clock p. m., the said Northern Hydraulic Press Brick Co., for the purpose of securing and perfecting a lien for the money so due it, as aforesaid, upon said building and lot hereinbefore described under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said district court and an abstract thereof made, as required by law; that no part of said sum of $70.00 has been paid except the sum of $3.34, paid thereon on the 14th day of December, 1893, and that the total amount due and unpaid of principal and interest to the plaintiff The Menomonie Hydraulic Press Brick Co. under said contract on the 3rd day of May, 1899, was and is the sum of ninety-one and $\frac{74}{100}$ dollars ($91.74);

and (6) that the plaintiff F. X. Goulet furnished 89 M bricks for the said new two-story brick building in the summer and fall of 1893 under a contract with the defendant Rosa
49 Herzman therefor; that the said bricks were used in said building, and the agreed price thereof was $6.00 per M, and amounted to the sum of $534.00; that the delivery of said brick was completed September 20th, 1893; that from time to time prior to such date that said Rosa paid sundry sums thereon, amounting to $320.74, leaving a balance unpaid of $213.26 September 20th, 1893; that thereafter, on the 19th day of December, 1893, at 3.30 o'clock p. m., the said plaintiff, for the purpose of securing and perfecting a lien for the balance of the money so due his, as aforesaid, under said contract upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said building and lot are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit; which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law, and that thereafter, on the 5th day of January, 1894, the said defendant, Rosa, paid the plaintiff the further sums of $25.00 and $11.30, and that the total amount due and unpaid of principal and interest from the said defendant, Rosa, to the plaintiff F. X. Goulet under said contract on the 3rd day of May, 1899, was and is the sum of two hundred forty-three and $\frac{11}{100}$ dollars ($243.11); and (7) that the plaintiffs Hance Bros. furnished certain hardware for the said new two-story brick building in the summer and fall of 1893 under a contract therefor with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and to furnish certain materials and erect certain parts of said new two-story brick building; that the said Merritt performed his said contract, and in so doing used the hardware furnished by these plaintiffs; that the value of said hard-
ware was the sum of $67.06 on November 17th, 1893, at
50 which date the last delivery thereof was made, and that thereafter, on the 12th day of January, 1894, at 5.30 o'clock p. m., said plaintiffs, for the purpose of securing and perfecting a lien for the balance of the money so due them, as aforesaid, under said contract upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit; which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law; that thereafter, on the 12th day of January, 1894, the said defendant, Rosa, paid the plaintiffs the sum of $3.34, and that the total amount due and unpaid, prin-

cipal and interest, to the plaintiffs Hance Bros. under said contract on the 3rd day of May, 1899, was and is the sum of eighty-six and $\frac{47}{100}$ dollars ($86.47); and (8) that the plaintiff The Fargo Gas & Electric Co. furnished certain labor and materials for the said new two-story brick building in the summer and fall of 1893 under a contract with the defendant Rosa Herzman, the then owner of said lot, therefor; that the said materials were used in said building; that the value thereof was the sum of $72.90; that the last of said labor and materials were furnished on the 31st day of December, 1893; that thereafter, on the 13th day of January, 1894, at 5 o'clock p. m., the said plaintiff, for the purpose of securing and perfecting a lien for the money so due it, as aforesaid, under said contract upon the building and lot hereinbefore described, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged
51 with said lien and duly verified by affidavit; which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law; that the total amount due and unpaid of interest and principal from the the defendant Rosa to the plaintiff The Fargo Gas & Electric Co. under said contract on the 3rd day of May, 1899, was and is the sum of ninety-nine and $\frac{96}{100}$ dollars ($99.96); and (9) that Wheaton, Reynolds & Co. furnished certain mill-work, fixtures, and material, sash, doors, etc., for the said new two-story brick building in the summer and fall of 1893 under a contract therefor with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and furnish certain material and erect certain parts of said new two-story brick building; that said Merritt performed his said contract and in so doing used the mill-work, fixtures, sash, doors, etc., furnished by said Wheaton, Reynolds & Co.; that the value of said mill-work, fixtures, sash, doors, etc., was the sum of $372.73 on October 15th, 1893, at which date the last delivery thereof was made, and that thereafter, on the 16th day of January, 1894, at 9.15 o'clock a. m., said Wheaton, Reynolds & Co., for the purpose — securing and perfecting a lien for the balance of the money so due them, as aforesaid, under said contract upon said building and lot under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit; which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law, and that thereafter, on the 16th day of January, 1894, the said defendant, Rosa, paid to said Wheaton, Reynolds & Co. the sum of $19.72; that on the 15th day of April, 1897,
52 the said Wheaton, Reynolds & Co. duly made an assignment of all their property and estate, including said claim of in-

debtedness and lien under the laws of the State of Minnesota, where they then lived and were doing business, to one Walter A. Eggleston for the benefit of their creditors, and that said Eggleston accepted said trust and duly qualified therein, and thereafter, as such assignee, duly assigned to the plaintiff Henry E. Magill the said indebtedness and all liens securing the same, and that the said Henry E. Magill is now the owner of said lien and indebtedness and all liens securing the same, and that the total amount due and unpaid of principal and interest to the plaintiff Henry E. Magill under said contract on the 3rd day of May, 1899, was and is the sum of four hundred eighty-three and $\frac{73}{100}$ dollars; and (10) that the plaintiff S. F. Remer, as the Remer Roofing Co., furnished certain roofing, skylight, curbing, and other fixtures, labor, and materials for said new two-story brick building in the summer and fall of 1893 under a contract therefor with the defendant William H. Merritt, who then had a contract with the defendant Rosa Herzman, the then owner of said lot, to do certain work and to furnish certain materials and erect certain parts of said new two-story brick building; that said Merritt performed his said contract, and in so doing used the roofing, skylight, curbing, and other fixtures, labor, and materials furnished by the plaintiff; that the value of said roofing, skylight, curbing, and other fixtures, labor, and materials was the sum of $134.00 on the 11th day of November, 1893, at which date the last delivery thereof was made; that thereafter, on the 17th day of January, 1894, at 10.12 o'clock a. m., the said plaintiff, S. F. Remer, for the purpose of securing and perfecting a lien for the money so due him, as aforesaid, under said contract upon the said building and lot under the provisions of the mechanics' lien law for the State of North Dakota, filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description
53 of the property to be charged with said lien and duly verified by affidvit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law; that thereafter, upon the 4th day of November, 1893, the said defendant, Rosa, paid the plaintiff the sum of $7.00, and on the 29th day of December, 1893, the further sum of $25.00, and on the 17th day of January, 1894, the sum of $4.50, and that the total amount due and unpaid of principal and interest to the plaintiff S. F. Remer, under said contract, on the 3rd day of May, 1893, was and is the sum of one hundred thirty-three and $\frac{56}{100}$ dollars ($133.56), and (11) that the plaintiff Fargo Tile Walk Co., now known as Gruber & Co., furnished certain labor and material and laid and built a concrete walk and curbing in front of and adjacent to said new two-story brick building in the summer and fall of 1893, under a contract with said Rosa Herzman, the then owner of said lot, therefor, at the agreed price of $82.00; that the last of said labor and material was furnished on the 25th day of November, 1893, at which date said walk and curbing were completed; that on said 25th day of November, 1893, the said defendant, Rosa, paid upon said indebtedness sum of $50.00; that the

balance then due was the sum of $32.00; that thereafter, on the 2nd day of February, 1894, at 9 o'clock a. m., the said Fargo Tile Walk Co., for the purpose of securing and perfecting a lien for the money so due it, as aforesaid, under said contract upon said building and lot and the said walk, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made as required by law; that the total amount due and unpaid of principal
54 and interest from the defendant Rosa to the plaintiffs Gruber & Co., under said contract, on the 3rd day of May, 1899, was and is the sum of forty-three and $\frac{90}{100}$ dollars ($43.90), and (12) that the defendant Rosa Herzman, at the completion by the said defendant, William H. Merritt, of his said contract with her, as hereinbefore shown, failed and neglected to pay to said Merritt or to any person or persons in his behalf the balance of about one thousand sixty-five and $\frac{81}{100}$ dollars ($1,065.81) then due him under his said contract with said Rosa, and that thereupon, on the 3rd day of February, 1894, at 5 o'clock p. m., the said defendant, Merritt, for the purpose of securing and perfecting a lien for the balance of the money so due him as aforesaid under said contract upon the said building and lot, under the provisions of the mechanics' lien law for the State of North Dakota, duly filed in the office of the clerk of the district court for said Cass county, wherein said lot and building are situated, a just and true account of said demand, after allowing all credits, and containing a correct description of the property to be charged with said lien and duly verified by affidavit, which said account, affidavit, and claim of lien were duly filed by the clerk of said court and an abstract thereof made, as required by law, and that the amount embraced within and covered by said claim of lien filed by said Merritt included the amount hereinbefore shown to be due and unpaid to the plaintiffs Hance Bros., Henry E. Magill, and S. F. Remer; that the said defendant, Rosa Herzman, has never paid the said William H. Merritt or any person or persons for him or on his account, and (13) that the east wall of said new two-story brick building is a party wall and stands equally upon lots five (5) and six (6), in block five (5), of said original town site of the city of Fargo, and that the same was so built and made by a written agreement between said Rosa Herzman and the owner of said lot five (5), and that the west wall of said new two-story brick building is a party wall, standing wholly upon lot seven (7), in said block five (5), of the original town site of the city of
55 Fargo, and was so built and made in pursuance of a written agreement between said Rosa Herzman and the owner of said lot seven (7), and that the building in question and the buildings on either side, east and west, constitute a solid row of three brick buildings belonging to different owners, and that the build-

ing in question is incapable of being removed from said lot unless it be first torn down, and (4) that it would be for the best interests of all parties hereto that said land, viz., lot six (6), in block five (5), and the improvements thereon, should be sold together, and that the said lot and the said improvements are of equal value, and that each is at least of the value of two thousand five hundred dollars ($2,500.00), and that all of the allegations of the complaint, except as hereby otherwise shown, are true; and therefrom conclusions of law to the effect:

(1.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiff Archibald J. Craig the sum of $267.88, for which sum he is entitled to judgment against said Rosa Herzman and establishing a lien upon said lot and improvements; and

(2.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiff The Menomonie Hydraulic Press Brick Co. the sum of $91.74, for which sum it is entitled to judgment establishing a lien upon said lot and improvements; and

(3.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiff F. X. Goulet the sum of $243.11, for which sum he is entitled to judgment against said Rosa Herzman and establishing a lien upon said lot and improvements; and

(4.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiffs Hance Bros. the sum of $86.47, for which sum they are entitled to judgment establishing a lien upon said lot and improvements; and

(5.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiffs The Fargo Gas & Electric Co. the sum of $49.86, for which sum it is entitled to judgment against the said
56 Rosa Herzman and establishing a lien upon said lot and improvements; and

(6.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiff Henry E. Magill the sum of $483.73, for which sum he is entitled to judgment establishing a lien upon said lot and improvements; and

(7.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiff S. F. Remer the sum of $133.56, for which sum he is entitled to judgment establishing a lien upon the said lot and improvements; and

(8.) That there was due and unpaid on the 3rd day of May, 1899, to the plaintiffs Gruber & Co. the sum of $43.90, for which sum they are entitled to judgment against said Rosa Herzman and establishing a lien upon said lot and improvements; and

(9.) That the sum- so found due and unpaid to the plaintiffs above named are each hereby adjudged to be and constitute a first and prior lien, in the order stated, upon said new two-story brick building and a lien upon said lot, but subject to a prior lien of said defendant bank upon said lot only for said sum of three thousand one hundred eleven and $\frac{15}{100}$ dollars ($3,111.15); and

(10.) That each of the said plaintiffs hereinbefore named, in addition to the judgment hereinbefore directed, is entitled to recover his or its *pro rata* share of the costs and disbursements of this action,

taxable under sections 5575 and 5578 of Revised Codes, including statutory costs of $5.00 for drawing his or its claim of lien and seventy-five cents clerk's fees for filing the same; and

(11.) That each and all the plaintiffs are entitled to judgment adjudging and directing that unless the defendant The Red River Valley National Bank of Fargo, on or before thirty days from and after the day of service of a copy of the final judgment herein upon it, pay or cause to be paid the said judgments of the plaintiffs, together with the interest thereon to the time of such payment and costs, then that the said lot number six (6), in block five (5),
57 in the original town site of the city of Fargo, Cass county, North Dakota, together with the improvements and building thereon and appurtenances, be sold, by or under the direction of the sheriff of said Cass county, in the manner and after the notice provided by law for the sale of real property upon execution, and of the money therefor received one-half be paid and delivered to the defendant The Red River Valley National Bank of Fargo and from the other half each of the plaintiffs herein be paid the sum of his or its judgment, together with costs, and in the order hereinbefore stated—that is to say, that the said Archibald J. Craig be first paid in full with costs, and thereafter the said Menomonie Hydraulic Press Brick Co. be paid in full with costs, and thereafter the said F. X. Goulet be paid in full with costs, and thereafter the said Hance Bros. be paid in full with costs, and thereafter the said Fargo Gas & Electric Co. be paid in full with costs, and thereafter the said Henry E. Magill be paid in full with costs, and thereafter the said S. F. Remer be paid in full with costs, and thereafter the said Gruber & Co. be paid in full with costs; or, in case there shall not be sufficient money received from said sale to pay all of said claims in full, then the same shall be so paid, in the order named, as fully as the money so received will pay, and any excess over and above the amount required to pay said judgments and costs be paid and delivered to said Red River Valley National Bank, its successors or assigns; and

(12.) That any party to this action may be a purchaser at said sale, and that the said sheriff report his doing in the premises to the court immediately after said sale, and upon the confirmation of said sale by the court that he make and deliver to the purchaser a deed in due form of said lot and improvements, and that thereafter the title to said lot, improvements, and appurtenances shall vest in and absolutely belong to such purchaser, and fully released of and from all title, right, claim, and lien of each and all parties hereto, and ordering and directing that judgment be entered accordingly.

58 Now, therefore, upon motion of Newton & Smith and Benton, Lovell & Bradley, attorneys for the plaintiffs herein, it is hereby ordered, adjudged, and considered:

1.

That the said plaintiff, Archibald J. Craig, have and recover of and from the defendant Rosa Herzman the sum of two hundred

sixty-seven and $\frac{88}{100}$ dollars ($267.88), together with his costs and disbursements of this action, stipulated and taxed by the clerk of this court according to law, and amounting to the sum of $27.30, and the total amount of which debt and costs is the sum of two hundred ninety-five and $\frac{18}{100}$ dollars ($295.18), this 3rd day of May, 1899, and that said sum is a first and prior lien upon the said new two-story brick building standing upon said lot six (6), in block five (5), of the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15.

2.

That the plaintiff The Menomonie Hydraulic Press Brick Co., a corporation, have and recover the sum of ninety one and $\frac{74}{100}$ dollars ($91.74), together with its costs and disbursements of this action, stipulated and taxed by the clerk of this court at $13.24, and the total amount of which debt and costs is the sum of one hundred four and $\frac{98}{100}$ dollars, this 3rd day of May, 1899, and that sum is a first and prior lien upon said new two-story brick building standing upon lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15 and a prior lien in favor of the plaintiff Craig, as shown in paragraph 1 hereof.

3.

That the plaintiff F. X. Goulet have and recover of and from the defendant Rosa Herzman the sum of two hundred forty-three and $\frac{11}{100}$ dollars ($243.11), together with his costs and dis-
59 bursements of this action, stipulated and taxed by the clerk of this court at $25.30, and the total amount of which debt and costs is the sum of two hundred sixty-eight and $\frac{41}{100}$ dollars ($268.41), this 3rd day of May, 1899; that said sum is a first and prior lien upon said new two-story brick building standing upon lot six (6), in block (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15 and prior liens in favor of plaintiffs Archibald J. Craig and The Menomonie Hydraulic Press Brick Co., a corporation, as shown in paragraphs 1 and 2 hereof.

4.

That the plaintiffs Hance Bros. have and recover the sum of eighty-six and $\frac{47}{100}$ dollars ($86.47), together with their costs and disbursements of this action, stipulated and taxed by the clerk of this court at $12.72, and the total amount of which debt and costs is the sum of ninety-nine and $\frac{19}{100}$ dollars ($99.19), this 3rd day of May, 1899, and that said sum is a first and prior lien upon said new two-story brick building standing upon lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien

of the defendant bank upon said lot only for said sum of $3,111.15 and prior liens in favor of Archibald J. Craig, the Menomonie Hydraulic Press Brick Co., and F. X. Goulet, as shown in paragraphs 1, 2, and 3 hereof.

5.

That the plaintiff The Fargo Gas & Electric Co. have and recover of and from the defendant Rosa Herzman the sum of ninety-nine and $\frac{96}{100}$ dollars ($99.96), together with its costs and disbursements of this action, stipulated and taxed by the clerk of this court at $13.79, and the total amount of which debt and costs is the sum of one hundred thirteen and $\frac{75}{100}$ dollars ($113.75), this 3rd day of May, 1899, and that said sum is a first and prior lien upon said
60 new two-story brick building standing upon lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a prior lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15 and prior liens in favor of Archibald J. Craig, the Menomonie Hydraulic Press Brick Co., F. X. Goulet, and Hance Bros., as shown in paragraphs 1, 2, 3, and 4 hereof.

6.

That the plaintiff Henry E. Magill have and recover the sum of four hundred eighty-three and $\frac{73}{100}$ dollars ($483.73), together with his costs and disbursements of this action, stipulated and taxed by the clerk of this court at $44.62, and the total amount of which debt and costs is the sum of five hundred twenty-eight and $\frac{35}{100}$ dollars ($528.35), this 3rd day of May, 1899, and that this sum is a first and prior lien upon said new two-story brick building standing upon lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15 and prior liens in favor of Archibald J. Craig, the Menomonie Hydraulic Press Brick Co., F. X. Goulet, Hance Bros., and the Fargo Gas & Electric Co., as shown in paragraphs 1, 2, 3, 4, and 5 hereof.

7.

That the plaintiff S. F. Remer have and recover the sum of one hundred and thirty-three and $\frac{56}{100}$ dollars ($133.56), together with his costs and disbursements of this action, stipulated and taxed by the clerk of this court at $16.55, and the total amount of which debt and costs is the sum of one hundred fifty and $\frac{11}{100}$ dollars ($150.11), this 3rd day of May, 1899, and that said sum is a first and prior lien upon said new two-story brick building standing upon lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for
61 said sum of $3,111.15 and prior liens in favor of Archibald J. Craig, the Menomonie Hydraulic Press Brick Co., F. X.

Goulet, Hance Bros., the Fargo Gas & Electric Co., and Henry E. Magill, as shown in paragraphs 1, 2, 3, 4, 5, and 6 hereof.

8.

That the plaintiffs Gruber & Co. have and recover of and from the defendant Rosa Herzman the sum of forty-three and $\frac{90}{100}$ dollars ($43.90), together with their costs and disbursements of this action, stipulated and taxed by the clerk of this court at $6.93, and the total amount of which debt and costs is the sum of fifty and $\frac{83}{100}$ dollars ($50.83) this 3rd day of May, 1899, and that said sum is a first and prior lien upon said new two-story brick building standing upon lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, and a lien upon said lot, but subject to a prior lien of the defendant bank upon said lot only for said sum of $3,111.15 and prior liens in favor of Archibald J. Craig, the Menomonie Hydraulic Press Brick Co., F. X. Goulet, Hance Bros., the Fargo Gas & Electric Co., Henry E. Magill, and S. F. Remer, as shown in paragraphs 1, 2, 3, 4, 5, 6, and 7 hereof.

9.

That unless the defendant The Red River Valley National Bank of Fargo, on or before thirty days from and after the service of a copy of this judgment upon it, pay or cause to be paid the said judgments of the plaintiffs, together with the interest thereon to the time of such payment and costs, then the said lot six (6), in block five (5), in the original town site of the city of Fargo, Cass county, North Dakota, together with the improvements and building thereon and appurtenances, be sold by or under the direction of the sheriff of said Cass county in the manner and after the notice provided by law for the sale of real property upon execution, and of the moneys therefor received one-half be paid and delivered to the defendant The Red River Valley National Bank of Fargo, and from the other one-half each of the plaintiffs herein be paid the sum of his
62 or its judgment, together with costs, and in the order hereinbefore specified—that is to say, that the said Archibald J. Craig be first paid in full with costs and interest, and thereafter the said Menomonie Hydraulic Press Brick Co. be paid in full with costs and interest, and thereafter the said F. X. Goulet be paid in full with costs and interest, and thereafter the said Hance Bros. be paid in full with costs and interest, and thereafter the said Fargo Gas & Electric Co. be paid in full with costs and interest, and thereafter the said Henry E. Magill be paid in full with costs and interest, and thereafter the said S. F. Remer be paid in full with costs and interest, and thereafter the said Gruber & Co. be paid in full with costs and interest; and in case there should not be sufficient money received upon said sale to pay all of said claims, then the same shall be paid in the order named as fully as the money so received will pay, and any excess over and above the amount required to pay said judgments and costs be paid and delivered to said Red River Valley national bank, its successors or assigns.

10.

That any party to this action may be a purchaser at said sale, and that the said sheriff report his doings in the premises to the court immediately after said sale, and upon the confirmation of said sale by the court that he make and deliver to the purchaser a deed in due form of said lot and improvements, and that thereafter the title to said lot, improvements, and appurtenances shall vest in and absolutely belong to said purchaser and fully released of and from all title, right, claim, and lien of each and all parties to this action.

Witness the Honorable Charles A. Pollock, judge of the district court in and for the third judicial district of the State of North Dakota, at the court-house, in the city of Fargo, Cass county, this 10th day of May, A. D. 1899.

Attest: E. M. PATTON, *Clerk*,
By W. A. BROWN, *Deputy*.

63 (Endorsements:) Judgment. Due and personal service of the within judgment by copy is hereby admitted this 10th day of May, 1899, at Fargo, North Dakota, and notice of the entry of judgment is hereby admitted. Mills, Greene & Resser, attorneys for def't R. R. V. Nat. Bk., Fargo, North Dakota. Newton & Smith, Benton, Lovell & Bradley, attorneys for plaintiffs, Fargo, North Dakota. Filed in the office of clerk district court Cass Co., N. Dak., May 10, 1899. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG ET AL., Plaintiffs, }
vs. }
ROSA HERZMAN ET AL., Defendants. }

It is hereby stipulated by and between the parties to the above-entitled action that the findings of fact and judgment therein may be amended as of the date of the filing and entry of the same in the manner following, to wit: By inserting in the first finding of fact, immediately following the term $3,000, the following words and figures: "Which said mortgage was duly filed in the office of the register of deeds of Cass county, in the Territory of Dakota, now State of North Dakota, on the 19th day of July, A. D. 1884, and was recorded in Book 'U' of Mortgages, at page 341;" and, further, that such an amendment to the judgment in said action in the same manner be inserted in the first paragraph of the said judg-
64 ment, immediately following the term "$3,000," where the same occurs in said first paragraph of said judgment.

Dated Fargo, N. D., September 4th, A. D. 1899.

NEWTON & SMITH,
BENTON, LOVELL & BRADLEY,
Attorneys for Plaintiffs.

JOHN E. GREENE,
MILLS, GREENE & RESSER,
MILLS, RESSER & MILLS,
Attorneys for Defendant Red River Valley Nat'l Bk. of Fargo.

Upon reading the foregoing stipulation it is ordered that the findings of fact and the judgment in said action be amended in the manner and to the effect in said stipulation set forth.

Dated September 4th, A. D. 1899.

By the court:

CHAS. A. POLLOCK,
District Judge.

(Endorsement:) Filed in the office of clerk of district court Cass Co., N. Dak., Sep. 11, 1899. E. M. Patton, clerk. W. A. Brown, deputy.

65 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

To Newton & Smith and Benton, Lovell & Bradley, attorneys for the above-named plaintiffs, and to E. M. Patton, clerk of the district court:

Please take notice that the above-named defendant, The Red River Valley National Bank of Fargo, appeals to the supreme court of the State of North Dakota from the whole of the judgment of the district court entered herein on the 10th day of May, 1899, except so much of said judgment as adjudges that the several plaintiffs herein recover of the defendant Rosa Herzman the several amounts named in said judgment, together with the interest and costs therein named.

Dated this 14th day of August, A. D. 1899.

W. C. RESSER AND
MILLS, RESSER & MILLS,
Attorneys for the Defendant The Red River Valley National Bank of Fargo.

66 (Endorsements:) Due service of the within notice of appeal admitted this 16 day of August, 1899. Newton & Smith, Benton, Lovell & Bradley, attorneys for plaintiffs. Filed in the office of clerk district court Cass Co., N. Dak., Aug. 16, 1899. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

Whereas on the 10th day of May, 1899, the plaintiffs recovered a judgment in the above-entitled action against the defendants, adjudging, among other things, that each of said plaintiffs had a lien superior to the lien or title of the defendant The Red River Valley National Bank of Fargo on the building situated on the premises described in the complaint herein for the several amounts named in said judgment, and also adjudging that unless the defendant The Red River Valley National Bank of Fargo, on or before thirty days from and after the service of a copy of said judgment upon it, pay or cause to be paid said judgment to the plaintiffs, together with the interest thereon to the time of such payment and costs, then the said lot and premises described in the complaint, with the
67 appurtenances and improvements and buildings thereon, to be sold by and under the direction of the cheriff of Cass county in the manner provided by law for the sale of real estate upon execution, and that — the money thereby received one-half to be paid and delivered to the defendant The Red River Valley National Bank of Fargo, and from the other half each of the plaintiffs therein to be paid the sum of his or its judgment, together with the costs, in the order in said judgment specified, and the defendant The Red River Valley National Bank of Fargo, feeling aggrieved by said judgment, intends to appeal therefrom to the supreme court of the State of North Dakota:

Now, therefore, we, the Red River Valley National Bank of Fargo, as principal, and John W. von Neida and James E. Hyde, of Fargo, Cass county, North Dakota, as sureties, do hereby undertake, promise, and agree that the appellants will pay all costs and damages which may be awarded against it on such appeal, not exceeding the sum of two hundred and fifty dollars.

Dated this 15th day of August, A. D. 1899.

THE RED RIVER VALLEY NAT'L BANK OF FARGO,
By JOHN W. VON NEIDA, *President.*
JOHN W. VON NEIDA.
JAMES E. HYDE.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

On this 16th day of August, A. D. 1899, before me personally came John W. von Neida and James E. Hyde, to me known to be the persons who are described in and who executed the foregoing undertaking, and severally acknowledged to me that they executed the same, and the said John W. von Neida further acknowledged that he executed the same for said Red River Valley National Bank of Fargo as the president thereof.

RUTH E. CLARK,
[SEAL.] *Notary Public, Cass Co., N. D.*

68 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

John W. von Neida and James E. Hyde, being duly sworn, each for himself says that he is a resident and freeholder of the State of North Dakota and is one of the sureties named in the foregoing undertaking and is worth the sum of five hundred dollars over and above all his debts and liabilities in property within this State and not exempt by law from levy and sale on execution.

JOHN W. VON NEIDA.
JAMES E. HYDE.

Subscribed and sworn to before me this 16th day of August, A. D. 1899.

RUTH E. CLARK,
[SEAL.] *Notary Public, Cass Co., N. D.*

(Endorsements:) Due service of within undertaking admitted this 16th day of August, 1899. Newton & Smith, Benton, Lovell & Bradley, attorneys for plaintiffs. Filed in the office of clerk of district court, Cass Co., N. Dak., Aug. 16, 1899. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG ET AL., Plaintiffs, }
vs. }
ROSA HERZMAN ET AL., Defendants. }

I, Chas. A. Pollock, judge of the district court in and for the county of Cass, do hereby certify that the above and foregoing papers, viz., the summons, complaint, answer of the defendant Red
69 River Valley National Bank, affidavit of *no*, answer, statement of costs and disbursements and stipulation, findings of fact and conclusions of law, judgment and decree, stipulation amending findings of fact and judgment, notice of appeal, and undertaking on appeal, are contained in and constitute the judgment-roll and

the entire record in the above-entitled action, and that the same are the original files and records in said action.

Dated this 14th day of September, A. D. 1899.

CHAS. A. POLLOCK, *Judge.*

STATE OF NORTH DAKOTA, *County of Cass,* } ss:

In District Court, Third Judicial District.

ARCHIBALD J. CRAIG ET AL., Plaintiffs,
vs.
ROSA HERZMAN ET AL., Defendants.

I, E. M. Patton, clerk of the district court within and for the said county of Cass, in the third judicial district of the State of North Dakota, do hereby certify that the above and foregoing papers are the original notice of appeal, with proof of service thereof, and the undertaking given thereon, and also the original judgment-roll, stipulation amending findings, and decree and certificate of the judge thereto appended, in the above-entitled action, wherein Archibald J. Craig *et al.* are plaintiffs and Rosa Herzman *et al.* are defendants, as the same now remains of record in said court, and the same are transmitted to the supreme court pursuant to said appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 14th day of September, A. D. 1899.

E. M. PATTON, *Clerk,*
[SEAL.] By W. A. BROWN, *Deputy.*

70 On the 2nd day of October, A. D. 1899, there was filed in the said the supreme court of the State of North Dakota by W. C. Resser, Esq., and Messrs. Mills, Resser & Mills, attorneys for appellant, assignment of errors; which said assignment of errors is in words and figures as follows, to wit:

First. The court erred in its first conclusion of law in this, in holding that the plaintiff Archibald J. Craig is entitled to judgment establishing a lien on the premises described in the complaint for the sum of two hundred sixty-seven and $\frac{88}{100}$ dollars or any other amount, and in that said conclusion of law is not supported by the facts found by the court.

Second. The court erred in its second conclusion of law in this, in finding that the Menomonie Hydraulic Press Brick Company is entitled to a judgment establishing a lien on the premises described in the complaint for the sum of ninety-one and $\frac{74}{100}$ dollars or any other sum or amount, and in that said conclusion of law is not supported by the facts found by the court.

Third. The court erred in its third conclusion of law in this, in holding that the plaintiff F. X. Goulet is entitled to a judgment establishing a lien upon the premises and improvements described in the complaint for two hundred forty-three and $\frac{11}{100}$ dollars or any other sum or amount, and in that said conclusion of law is not supported by the facts found by the court.

Fourth. The court erred in its fourth conclusion of law in this, in finding that the plaintiffs Hance Brothers are entitled to a judgment establishing a lien upon the premises and improvements described in the complaint for the sum of eighty-six and $\frac{47}{100}$ dollars or any other sum or amount, and in that the said conclusion of law is not supported by the facts found by the court.

Fifth. The court erred in its fifth conclusion of law in this, in finding that the Fargo Gas and Electric Co. is entitled to a lien
71 on the premises described in the complaint for the sum of ninety-nine and $\frac{96}{100}$ dollars or any other sum or amount whatsoever, and in that the said conclusion of law is not supported by the facts found by the court.

Sixth. The court erred in its sixth conclusion of law in this, in finding that the plaintiff Henry E. Magill is entitled to a judgment establishing — upon the premises and improvements described in the complaint for four hundred eighty-three and $\frac{73}{100}$ dollars or any other sum or amount, and in that the said conclusion of law is not supported by the facts found by the court.

Seventh. The court erred in its seventh conclusion of law in this, in finding that the plaintiff S. F. Remer is entitled to judgment establishing a lien upon the premises and improvements described in the complaint for the sum of one hundred thirty-three and $\frac{56}{100}$ dollars or any other sum or amount, and in that said conclusion of law is not supported by the facts found by the court.

Eighth. The court erred in its eighth conclusion of law in this, in finding that the plaintiffs Gruber & Co. are entitled to judgment establishing a lien upon the premises described in the complaint for forty-three and $\frac{91}{100}$ dollars or any other amount, and in that said conclusion of law is not supported by the facts found by the court.

Ninth. The court erred in its ninth conclusion of law in this:

(*a.*) In finding and adjudging that the sums found due each of the plaintiffs constitute a first and prior lien upon the new brick building erected upon the premises described in the complaint.

(*b.*) In adjudging that the said sums found due the several plaintiffs are liens on the lot described in the complaint.

(*c.*) In adjudging that the said sums due the several plaintiffs are liens either on said lot or building.

Tenth. The court erred in its eleventh conclusion of law in this:

(*a.*) In holding and directing judgment that if this ap-
72 pellant failed to pay the amount due the several plaintiffs, with interest and costs, that the premises described in the complaint be sold by the sheriff.

First. That the statute under which the several liens described in the complaint and findings herein were filed were repealed before the commencement of this action.

Second. That said part of section 4795 of the Revised Codes of 1895 which authorizes a sale of the whole premises upon which a mechanics' lien is filed and a division of the money arising from such sale so as to give the prior mortgage or other prior lien priority on the lot and the mechanics' lien priority on the building or im-

provement is in violation of section 10 of article 1 of the Constitution of the United States and section 16 of article 1 of the constitution of North Dakota as to mortgages given prior to its passage.

Third. That that part of section 4795 of the Revised Codes of 1895 authorizing a sale of the lot and building and apportionment of the proceeds between prior mortgagees and mechanic-lien holders as provided for in said section is not retroactive and does not govern mortgages given prior to its passage.

(*b.*) In directing that half the proceeds of said sale be paid to this appellant and the remainder applied to the payment of the amounts found due the several plaintiffs, with interest and costs.

(*c.*) In directing a sale of said premises for any purpose.

On the 5th day of October, 1899, the said cause was duly presented to the supreme court of the State of North Dakota by argument of counsel for the respective parties, wherein the following appearances were made: For the appellant, Messrs. Mills, Resser & Mills; *contra*, Newton & Smith.

Whereupon said cause was argued, submitted to the court, and by the court taken under advisement.

73 On the 1st day of December, 1899, the following order of affirmance of the judgment of the district court of Cass county, N. D., was entered in the said supreme court of the State of North Dakota; which order is in words and figures as follows, to wit:

File No., 741.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

ARCHIBALD J. CRAIG ET AL., Plaintiffs and Respondents,
vs.
ROSA HERZMAN ET AL., Defendants and Appellants.

Appeal from the district court of Cass county.

This action coming on to be heard at the Sept., A. D. 1899, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota—present, J. M. Bartholomew, chief justice; Alfred Wallin and N. C. Young, associate justices—and the appeal herein having been argued by Mills, Resser & Mills, for the appellants, and by Newton & Smith, for respondents, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Cass county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondents have

and recover of the appellants costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated Dec. 1, 1899.

By the court:

J. M. BARTHOLOMEW,
Chief Justice.

Attest:

[SEAL.] R. D. HOSKINS, *Clerk.*

74 On the 1st day of December, 1899, the following opinion of the said the supreme court was filed, and is in words and figures as follows, to wit:

In the Supreme Court, State of North Dakota, September Term, 1899.

ARCHIBALD J. CRAIG ET AL., Respondents,
vs.
ROSA HERZMAN ET AL., Appellants.

The provisions found in section 4795, Revised Codes, giving a court authority, under conditions stated therein, to order real estate to be sold and the proceeds to be divided between the mortgagee who had the first lien upon the land and a mechanics' lien holder who had a first lien upon the building does not impair the obligations of the mortgage existing upon said land before the building was erected and before the law was passed.

Such provision, as it relates to procedure only, may be applied in any case tried after its enactment, although the cause of action arose before the enactment. The rule requiring statutes to be given prospective operation only does not apply to statutes relating to procedure.

The repeal of the mechanics' lien law as it existed in the Compiled Laws by the enactment of the Revised Codes did not operate to extinguish liens that had been acquired under the prior law. Where a mechanics' lien has attached under the law in force at that time, the holder's right thereto becomes vested and cannot be destroyed by the repeal of the law.

(Syllabus by the court.)

Appeal from the district court of Cass county, Charles A. Pollock, judge.

Mills, Resser & Mills, for appellants.

Newton & Smith and Benton, Lovell & Bradley, for respondents.

75 BARTHOLOMEW, *C. J.:*

This is a contest between certain mechanics' lien holders and a purchaser under a mortgage foreclosure sale. The property consists of a certain lot in the city of Fargo, upon which a two-story brick building, with party walls on either side, has been erected. The mortgage was given long before the building or any part thereof

was placed upon the lot. The mechanics' liens attached before the foreclosure of the mortgage. This action was brought by the lienholders. The Red River Valley National Bank was the only defendant that appeared and answered. It claimed title under the foreclosure proceedings free and clear from all the mechanics' liens. The trial court established the liens upon the building and the value of the building separately and each at the same sum, and directed that the premises be sold, and that one-half of the proceeds of sale be paid over to the defendant bank; that the mechanics' liens as established and in their order be paid from the other half, and that the surplus, if any, be paid over to the bank. From this decree the bank appeals.

The first position of appellant, as we understand it, is briefly this: When the mortgage under which it derives title was given and when it was foreclosed and when appellant received its deed thereunder, the statute in force relative to mechanics' liens declared that where a building was erected upon land upon which there was an existing mortgage the mortgage should remain a first lien upon the land, but that the liens for labor and materials used in the construction of the building should be a first lien upon the building, and that the building might be sold under said liens and removed from the land (Compiled Laws, section 5480). It concedes that it possesses only such rights as came to it through the mortgage, and that it took such rights subject to the mechanics' liens so far as they existed and could be enforced under the law existing when the mortgage was given and when appellant acquired its title, but to no other or greater extent. It claims that the provision under
76 which the court ordered a sale of the entire property was passed after it acquired its rights and in effect impaired the obligations of the mortgage contract, and hence, as to appellant, such provision is unconstitutional and void. The provision is found in section 4795, Revised Codes, which went into effect January 1st, 1896, and is as follows: "But if in the opinion of the court it would be for the best interests of all the parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate values of the land and of the erection, buildings or other improvements, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanics' lien priority upon the building, erection or other improvement." It will be noticed that under the prior law the priority of the mechanics' lien was enforced by a sale and removal of the building. It so happens in this case that the building is so situated that it can be removed only by demolition. This a court will not sanction where it would impair the right of the former mortgagee. Lumber Co. *vs.* Danner, 3 N. D., 475. Hence if appellant's contention that its contract rights are impaired be correct it will follow that the mechanics' liens can never be enforced against the property, and the appellant will enjoy the rare good fortune of having the value of its property doubled without any expense to itself.

It is admitted that the statute of which complaint is made is primarily remedial in character, but it is insisted that if it enforce a remedy in a manner that prejudices contract rights the fact that it is remedial does not take it out of the operation of the constitutional inhibition. It must be conceded that such is the law. Taylor *vs.* Stearns, 18 Gratt., 288; Bank *vs.* Schranck, 97 Wis., 250; Barnitz *vs.* Beverly, 16 Sup. Ct. Rep., 1042; Edwards *vs.* Kearney, 96 U. S., 600; Antoni *vs.* Greenhow, 107 U. S., 769. It is necessary, then, to determine whether this statute did prejudicially affect the contract rights existing by virtue of the mortgage. The impairment
77 prohibited by the constitution is not a mere imaginary or possible injury. The law must render the contract obligation less valuable either by a contraction of its scope or increasing its duties or by rendering it invalid or less enforceable. If such be the necessary effect of the law, it matters not how slight the impairment. Green *vs.* Biddle, 8 Wheat., 1. What were the rights of the mortgagee under the mortgage? Primarily to have the property covered by the mortgage, which was the naked lot, applied to the satisfaction of the debt secured by the mortgage. True, as to the mortgagor the rights under the mortgage have ripened into title; his right of redemption has been foreclosed. But as to these lienholders, whose rights in the building under the former law were superior to the rights of the mortgagee, and which rights could not be affected by the foreclosure, the appellant must still rely solely upon its right under the mortgage. Under the amended statute and under the decree of the trial court the lot is still devoted exclusively to the payment of the mortgage debt. The contract obligation is not impaired in that respect. But appellant says that if a mechanic's lien may be enforced by compelling a sale of the entire property it might force a mortgagee to change the term of his investment and put him to the trouble and expense of seeking another investment, and perhaps with a lower rate of interest. Should we admit this to be a valid objection to the statute—and we do not—still the answer would be that this appellant cannot raise that objection. Here on the record the mortgage was long since due. Appellant cannot possibly suffer in the manner indicated. "Only those whose rights would be prejudiced by the enforcement of an unconstitutional act can be heard to question its validity." 6 Amer. & Eng. Enc. of Law, 1090, and cases cited. Again, it is urged that the law forces the mortgagee's security to a forced sale at the instance of the mechanic's-lien holder, possibly on a bad market, and compels him to take such proportionate share in the proceeds as will give him priority on the land. This is only an imaginary
78 possibility. The statute does not necessitate a sale upon a bad market. The law cannot presume anything of the kind. Moreover, the objection ignores the express wording of the statute. It says: "But if in the opinion of the court it would be for the best interests of all parties," etc. The interests of the mortgagee are as carefully fostered as those of the mechanic's-lien holder. In this case we are bound to presume that the court found it to be for the best interest of appellant that the sale should be so ordered, and that

is conclusively presumed to be correct, as it is not brought before us for review. We are clear that there is no impairment of contract here involved of which appellant can complain.

Another position urged by appellant is that the statute as found in the revised codes is prospective only and cannot be given a retrospective operation, and hence cannot apply to the liens here involved or to rights accruing under the mortgage. The general rule requiring statutes to be given only a prospective operation, unless a different legislative intent is manifest, is well settled. But the rule is not generally applied to statutes relating to procedure. In Sutherland on Statutory Construction, section 482, it is said: "Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken—the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law—will stand unless an intention to the contrary is plainly manifested; and pending cases are not affected by general words as to future proceedings from the point reached when the new law intervened. A remedy may be provided for existing rights and new remedies added to or substituted for those which exist. Every case must to a considerable extent depend on its own circumstances. General words in remedial statutes
79 may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness, and justice." The numerous cases cited by the author abundantly support the text. The new statute, in so far as it authorizes the court to order a sale of the entire property and divide the proceeds in a manner to properly secure the rights of the respective parties, related to procedure only, and must be given a retrospective operation.

As its last contention appellant urges that all the mechanics' liens here asserted arose and were claimed under the lien law as it existed in the compiled laws, and that such law was expressly repealed by the revised codes without any saving clause, and that consequently the liens given by that law perished with it. We do not think this result followed. We had occasion to discuss this point to some extent in Gull River Lumber Co. *vs.* Lee, 7 N. D., 135. The authorities are not unanimous. We cited them to some extent on page 137, but did not decide the point, as it was not necessary in that case. We were there discussing a purely statutory lien, a lien on personal property for taxes and in which no element of consideration or contract could enter. Where, under a contract such as the law prescribes, one party furnishes to another things of value for which the law gives the party furnishing a lien, such party upon compliance with the statute has a vested right in such lien. It is the security, the mortgage, which the law furnishes him and upon which he relied in parting with his valuables. It is property in his hands and cannot be divested by a repeal of the law under which

he obtained it. In Weaver *vs.* Sells, 10 Kans., 609, it is said: "Whenever a mechanic's lien is created for material furnished, the right to the lien becomes a vested right at the time the material is so furnished, and it is not within the power of the legislature to afterwards destroy such right by repealing the statute under which the right has accrued or otherwise." In Hoffman *vs.* Walton, 36 Mo., 615, it is said: "The lien when filed operates as an encumbrance." In Wade on Retroactive Laws, section 173, after
80 stating the general principle that vested rights could not be destroyed by legislative action, adds: "The rights of contractors, material-men, subcontractors, and laborers, under statutes giving mechanics' liens and rendering them enforceable against the property upon which the work is done or materials furnished, are similar in kind and governed by the same principles. The lien secured by giving notice and otherwise complying with the law, or even the right to the lien before notice given, is part of the obligation of the contract, and at the same time is a right which the law secures to the mechanic or material-man under the same sanctions as may be invoked to protect the title to corporeal property." In Waters *vs.* Dixie Lumber & Manufacturing Co. (Ga.), 32 S. E. Rep., 636, it is said: "When the lien of a material-man has, under the terms of the statute, become fixed and secured, such lien is then a vested right, and no subsequent repeal or modification of the act under which it became fixed can destroy or modify such right." See also Handel *vs.* Elliott, 60 Tex., 145; Streubel *vs.* Railroad Co., 12 Wis., 67; Chowing *vs.* Barnett, 30 Ark., 560; Hallahan *vs.* Herbert, 11 Abb. Pr. (N. S.), 326; *In re* Hope Mining Co., Fed. Cases, 6681, vol. 12; Steamboat Co. *vs.* Joliffe, 2 Wall., 450; Skyrine *vs.* Mining Co., 8 Nev., 219; Baser *vs.* Shepard, 107 Ind., 417. We think the great weight of authority support the holding of the foregoing cases. They certainly commend themselves to us as both logical and equitable. For a collection of the authorities holding that mechanics' lien laws pertain only to the remedy and that liens are changed or swept away with the law, see Boiset on Mech. Liens, section 33 and cases cited.

Finding no error in the judgment-roll, the decree of the district court is in all things affirmed.

All concur.

J. M. BARTHOLOMEW.
ALFRED WALLIN.
N. C. YOUNG.

81 On the 18th day of December, 1899, the following petition for rehearing was filed in the said the supreme court of the State of North Dakota; which petition is in words and figures as follows, to wit:

In the Supreme Court of North Dakota.

ARCHIBALD J. CRAIG ET AL., Respondents,
vs.
ROSA HERZMAN, THE RED RIVER NATIONAL BANK, ET AL., Appellants.

Now comes the appellant The Red River National Bank of Fargo and prays the court for a reargument in this case on the grounds and for the reasons hereinafter stated:

First. On the 28th day of December, 1893, in the case of James River Lumber Company *vs.* Danner, 3 N. D., 475, this court solemnly decided in cases like the one at bar where the building could not be removed without demolition a lien did not exist. Relying upon this decision, the appellant purchased the certificate of sale issued in a regular statutory foreclosure under the laws then in existence, which gave a perfect title on the expiration of the year for redemption and the issuance of the sheriff's deed, so, as the law stood on the 17th day of May, 1895, the appellant acquired a perfect title. Either of your honors, acting as an attorney in the examination of an abstract a day after the recording the sheriff's deed, would have passed the title on the authority of the James Lumber Company *vs.* Danner, and any layman would not have hesitated in taking the title, for the language of the court is so plain that it does not take the trained mind of the lawyer to understand the meaning of the words of the court: "The lien could only be enforced by the sale of the building as a distinct thing. * * * Where this cannot be done, the lien does not exist." We ask each member of the court in considering this petition to put himself in the
82 place of an attorney examining an abstract of title of the premises in question on May 18th, 1895, the day after the sheriff's deed was given, take the facts in this case, examine them together with the decision of this court in the case of James River Lumber Company *vs.* Danner, and determine if you would not have advised a client then that the appellant had a title clear of these liens. If so, would you have said it could be divested by any subsequent legislation?

The principle here is important. The appellant may not be the only one that has invested its money on the faith of the stability of the decision of this court.

We respectfully but earnestly submit that the position taken by the court in the case at bar renders uncertain titles under statutory foreclosures; for if as here a title once complete under a statutory foreclosure can be subjected by legislation to a lot of liens, then the bar has no safe guide by which to advise in relation to titles depending on such foreclosures. This inexpensive method can no longer be followed with safety if the rule of *stare decisis* does not apply to decisions in regard to the force and effect of mechanics' liens.

Second. The right of statutory foreclosures as it exists at the time of giving the mortgage under which appellant acquired title was a part of the mortgage contract and cannot be taken away.

O'Brien *vs.* Krenz, 36 Minn., 136. It must also follow that the title acquired under such a sale is a part of the contract and cannot be disturbed without a violation of the obligations of the contract. At the date appellant's title was acquired under the foreclosure these liens did not exist for the reason they could not be enforced without a demolition of the building (James River Lumber Co. case, *supra*).

The statute so far as it would operate to create a lien that did not exist at the time it took effect is a most flagrant violation of both the State and Federal constitution.

MILLS, RESSER & MILLS,
Attorney- for Appellants.

83 On the 30th day of December, 1899, the following order denying said petition for rehearing was entered in the said the supreme court of the State of North Dakota; which order is in words and figures as follows, to wit:

File No., 741.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

ARCHIBALD J. CRAIG ET AL., Plaintiffs and Respondents,
vs.
ROSA HERZMAN ET AL, Defendants and Appellants.

Appeal from the district court of Cass county.

This action coming on to be heard at the Sept., A. D. 1899, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota.

Present: J. M. Bartholomew, chief justice; Alfred Wallin and N. C. Young, associate justices.

And a petition for a rehearing upon the appeal herein having been filed by Mills, Resser & Mills for the appellants, and the court having advised thereon, it is now here considered, ordered, and adjudged that the petition be, and the same is hereby, denied.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court.

Dated Dec. 1, 1899.

By the court:

J. M. BARTHOLOMEW,
Chief Justice.

Attest: R. D. HOSKINS, *Clerk.*

[SEAL.]

84 On the 26th day of January, 1900, the following petition for writ of error was filed in the said the supreme court of the State of North Dakota, and was in words and figures as follows, to wit:

To the Honorable J. M. Bartholomew, chief justice of the supreme court of the State of North Dakota:

Now comes the Red River Valley National Bank of Fargo, a corporation organized under and by virtue of the laws of the United States of America, by Ira B. Mills, William C. Resser, and Ernest B. Mills, its attorneys, and complains that in the records and proceedings, and also in the rendition of the judgment, in a suit between Archibald J. Craig, Menomonie Hydraulic Press Brick Co., a corporation; F. X. Goulet, Horace Hance and Edward B. Hance, late partners as Hance Brothers; Fargo Gas & Electric Co., a corporation; Henry F. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., plaintiffs, and Rosa Herzman, William H. Merritt, The Red River Valley National Bank of Fargo, a corporation; James A. Chesley and The Beidler, Robinson Lumber Co., a corporation, defendants, in the supreme court of the State of North Dakota, that being the highest court of law in said State in which a decision could be had in said suit, and in which final judgment was rendered against the defendant The Red River Valley National Bank of Fargo on the 1st day of December, 1899, wherein it was adjudged that the provisions of section 4795 of the 1895 Revised Codes of the State of North Dakota, to wit: "But if in the opinion of the court it would be for the best interests of all parties that the land and improvements thereon should be sold together, it shall so order, and the court shall take an account and ascertain the separate values of the land and of the erection, buildings or other improvements, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanics' lien priority upon the building, erection, or other improvement," being a part of chapter 77 of the Civil Code of said State, and
85 referring to mechanics' liens and the foreclosure thereof, *was* valid as against a certain mortgage, which at the date of the passage of said law and for some time prior thereto had been a valid and subsisting lien upon lot six (6), in block five (5), of the original town site of Fargo, Cass county, State of North Dakota, and to which said lot your petitioner, the defendant The Red River Valley National Bank of Fargo, held title by a valid and complete foreclosure of said mortgage, made prior to the taking effect of the said section 4795, and said court adjudged and decided that as to said mortgage and the title of the defendant under the foreclosure thereof said section 4795 of the Revised Codes of the State of North Dakota for the year 1895 was not in violation of section 10 of article 1 of the Constitution of the United States, in that the provisions of said section impaired the obligations of the contract of said mortgage and the defendant's title thereunder; that said suit could not have been determined by said court without determining whether the provisions of the statute of the State of North Dakota contained in section 4795 of the Revised Codes of 1895 was in violation of section 10 of article 1 of the Constitution of the United States by impairing the obligations of the contract contained in the mortgage

hereinbefore referred to and the title acquired by the defendant The Red River Valley National Bank of Fargo under the foreclosure of said mortgage; that said question was determined by said supreme court in favor of the validity of the provisions of said statute, and in said suit the supreme court of said State adjudged, decreed, and held valid as against said mortgage certain mechanics' liens filed by the several plaintiffs in said suit against the premises described in said mortgage for labor and materials furnished in the erection of a building on said mortgaged premises by the owner thereof, which said building was erected and labor and materials furnished a long time subsequent to the giving and recording of the mortgage above referred to, and said court further ad-
86 judged and decided that the said mortgaged premises and the building erected thereon be sold, and that the proceeds of such sale be divided between the plaintiffs and the defendant The Red River Valley National Bank of Fargo by paying said defendant one-half and dividing the other half of the proceeds of said sale between the plaintiffs, all of which appears in the records and pleadings in said suit, whereby manifest error has happened, to great damage of said The Red River Valley National Bank of Fargo, defendant in said suit.

Wherefore the said The Red River Valley National Bank of Fargo, one of the defendants in said suit, prays for the allowance of a writ of error and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

IRA B. MILLS,
WILLIAM C. RESSER,
ERNEST B. MILLS,
Attorneys for Defendant The Red River Valley National Bank of Fargo.

Allowed:

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

Bismarck, North Dakota, January 22nd, 1900.

87 On the 22nd day of January, 1900, the following bond on writ of error was filed in the said the supreme court of the State of North Dakota, and is in words and figures as follows, to wit:

STATE OF NORTH DAKOTA:

In Supreme Court.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., a Corporation; F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Bros.; Fargo Gas & Electric Co., a Corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Plaintiffs,

vs.

ROSA HERZMAN, WILLIAM H. MERRITT, THE RED RIVER VALLEY National Bank of Fargo, a Corporation; James A. Chesley, and The Beidler-Robinson Lumber Co., a Corporation, Defendants.

Know all men by these presents that we, the Red River Valley National Bank of Fargo, as principal, and John W. von Neida and James E. Hyde, of Fargo, Cass county, North Dakota, as sureties, are held and firmly bound unto Archibald J. Craig, Menomonie Hydraulic Press Brick Co., F. X. Goulet, Horace Hance, Edward B. Hance, Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, Matt Nuremberg, Frank Porwoll, and A. Gruber, plaintiffs above named, in the sum of thirty-five hundred dollars, to be paid to the said Archibald J. Craig, Menomonie Hydraulic Press Brick Co., F. X. Goulet, Horace Hance, Edward B. Hance, Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, Matt Nuremberg, Frank Porwoll, and A. Gruber, their executors, administrators, successors, or assigns; — which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and successors, firmly by these presents.

Dated this 17th day of January, A. D. 1900.

88 Whereas the above-named defendant, The Red River Valley National Bank of Fargo hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of North Dakota:

Now, therefore, the condition of this obligation is such that if the above named The Red River Valley National Bank of Fargo shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

RED RIVER VALLEY NAT'L BANK OF FARGO,
By JOHN W. VON NEIDA, *President.* [SEAL.]
JOHN W. VON NEIDA.
JAMES E. HYDE.

Signed and delivered in presence of—
WILLIAM C. RESSER.
IRA B. MILLS.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

On this 17th day of January, A. D. 1900, personally came before me John W. von Neida and James E. Hyde, to me known to be the sureties named in and who executed the foregoing instrument, and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein named, and the said John W. von Neida further acknowledged that he executed the same for the Red River Valley National Bank of Fargo as the president of said bank, and that he had authority to so execute said bond.

RUTH E. CLARK,
[SEAL.] *Notary Public, Cass County, North Dakota.*

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

John W. von Neida and James E. Hyde, being first duly sworn, each for himself says that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and
89 freeholder of the State of North Dakota and worth the sum of thirty-five hundred dollars specified in the within bond above his debts and liabilities and exclusive of property exempt from execution.

JOHN W. VON NEIDA.
JAMES E. HYDE.

Subscribed and sworn to before me this 17th day of January, A. D. 1900.

RUTH E. CLARK,
[SEAL.] *Notary Public, Cass County, North Dakota.*

(Endorsed:) I hereby approve the within bond and sureties this 22nd day of January, 1900. J. M. Bartholomew, chief justice of the supreme court of the State of North Dakota.

On the 22nd day of January, 1900, the following assignments of error were filed in the said the supreme court of the State of North Dakota, and are in words and figures as follows, to wit:

In the Supreme Court of the United States.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO, Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., F. X. Goulet, Horace Hance and Edward B. Hance, Late Partners as Hance Brothers; Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nuremberg, Frank Porwoll, and A. Gruber, as Gruber & Co., Defendants in Error.

Assignments of Error.

90 The plaintiff in error respectfully submits that the supreme court of the State of North Dakota erred, in this:

First. In holding, adjudging, and deciding that the claims for liens of the several defendants in error were prior liens on the building erected on the lot described in the complaint in this suit to the lien of the mortgage executed by Elvira Cooper to the Travelers' Insurance Company of Hartford, Connecticut, and recorded in the office of the register of deeds of Cass county, in the Territory of Dakota, July 19th, 1884, in Book 2 of Mortgages, on page 341.

Second. In deciding, decreeing, and adjudging that unless the Red River Valley National Bank of Fargo pay the defendants in error (the plaintiffs in the State courts) the amounts found due on their several claims for liens that the premises described in the complaint, to wit, lot six (6), in block five (5), of the original town site of Fargo, North Dakota, together with the buildings and improvements thereon, be sold in the manner provided by law for the sale of real property on execution, and of the moneys received one-half to be paid to the Red River Valley National Bank of Fargo, and from the other half each of the defendants in error here (the plaintiffs in the State courts) be paid the sum of his or its judgment, together with costs, in the order and manner specified in the ninth subdivision of said judgment, and any excess over and above the amount required to pay said judgments and costs be paid and delivered to the Red River Valley national bank, its successors or assigns.

Third. In holding, adjudging, and deciding that part of section 4795 of the 1895 Revised Codes of the State of North Dakota, viz., "But if in the opinion of the court it would be for the best interests of all parties that the land and improvements thereon should be sold together, it shall so order, and the court shall take an account and ascertain the separate values of the land and of the erection, buildings or other improvements, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanics' lien, priority upon the
91 building, erection or other improvement," was not a violation of section ten of article one of the Constitution of the United States, in so far as it applied to the mortgage described in the first assignment of error and the title of the Red River Valley National Bank of Fargo acquired under a foreclosure of said mortgage.

Fourth. That by the record herein it appears that judgment was given for Archibald J. Craig Menomonie Hydraulic Press Brick Co., F. X. Goulet, Horace Hance and Edward B. Hance, Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, Matt Nuremberg, Frank Porwoll, and A. Gruber against the Red River Valley National Bank of Fargo, whereas by the law of the land the said judgment ought to have been given for the said The Red River Valley National Bank of Fargo against Archibald J. Craig, Menomonie Hydraulic Press Brick Co., F. X. Goulet, Horace Hance, Edward B. Hance, Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, Matt Nuremberg, Frank Porwoll, and A. Gruber.

And the said The Red River Valley National Bank of Fargo prays that the judgment of the supreme court of the State of North Dakota

given herein be reversed, amended, and held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment.

IRA B. MILLS,
WILLIAM C. RESSER,
ERNEST B. MILLS,
Counsel for Plaintiff- in Error.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Bismarck, North Dakota, this 20th day of March, A. D. 1900.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of the State of North Dakota.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of North Dakota, Greeting:

Because that in the record and proceedings and also in the rendition of the judgment of a plea which is in the supreme court of the State of North Dakota, before you or some of you, being the highest court of law and equity in said State in which a decision could be had in the said suit between Archibald J. Craig, Menomonie Hydraulic Press Brick Co., a corporation; F. X. Goulet, Horace and Edward B. Hance, late partners as Hance Brothers; Fargo Gas and Electric Co., a corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nurenberg, Frank Porwoll, and A. Gruber, as Gruber & Co., plaintiffs, and Rosa Herzman, William H. Merritt, The Red River Valley National Bank of Fargo, James A. Chesley, and The Beidler-Robinson Lumber Co., defendants, wherein was drawn in question the validity of a statute of the State of North Dakota and the authority exercised under said statute, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the Red River Valley National Bank of Fargo, as by its complaint appears, we, being willing that the error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected,
92½ the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

preme Court of the United States, this 25th day of January, A. D. 0.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the Circuit Court of the United States in and for the District of North Dakota.

Writ allowed by—

HON. J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of North Dakota.

[Endorsed:] Writ of error to the United States Supreme Court. 741. Filed in the clerk's office, supreme court, State North Dakota, Jan. 26, 1900. R. D. Hoskins, clerk. Mills, Greene Lesser, attorneys & counsellors at law, Red River Valley National nk building, Fargo, North Dakota.

UNITED STATES OF AMERICA, *ss:*

e President of the United States to Archibald J. Craig, Menomonie Hydraulic Press Brick Co., a corporation; F. X. Goulet, Horace Hance and Edward B. Hance, late partners as Hance Brothers; Fargo Gas and Electric Co., a corporation; Henry E. Magill, S. F. Remer, as Remer Roofing Co.; Matt Nurenberg, Frank Porwoll, and A. Gruber, as Gruber & Co., and Newton & Smith and Benton, Lovell & Bradley, their attorneys:

You and each of you are hereby cited and admonished to be and pear at a term of the Supreme Court of the United States, at the y of Washington, District of Columbia, within sixty days from e date hereof, pursuant to the writ of error filed in the clerk's of- e of the supreme court of the State of North Dakota, wherein e Red River Valley National Bank of Fargo is plaintiff in error d you and each of you are defendants in error, to show cause, if y there be, why the judgment rendered against said plaintiff in ror, as in said writ of error mentioned, should not be corrected and y speedy justice should not be done to the parties in that behalf. Witness the Honorable Melville W. Fuller, Chief Justice of the preme Court of the United States of America, this 26th day of nuary, A. D. 1900.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

We hereby acknowledge service of the foregoing citation, at Fargo, North Dakota, January 27th, 1900, for F. X. Gou- , Horace Hance and Edward Hance, Henry E. Magill, S. F. mer, Matt Murenberg, Frank Porwoll, and A. Gruber, plaintiffs the suit in the supreme court of the State of North Dakota re- red to in the writ of error on which said citation was issued.

GEO. W. NEWTON,
EMERSON H. SMITH,
NEWTON & SMITH,
Attorneys for said Plaintiffs in the District and Supreme Court of the State of North Dakota.

We hereby acknowledge service of the foregoing citation, at Fargo, North Dakota, January 27th, 1900, for Menomonie Hydraulic Press Brick Co. and Fargo Gas and Electric Co., plaintiffs in the suit in the supreme court of the State of North Dakota referred to in the writ of error on which said citation was issued.

BENTON, LOVELL & BRADLEY,
J. D. BENTON,
V. R. LOVELL,
C. L. BRADLEY,
Attorneys for said Plaintiffs in District and Supreme Court of the State of North Dakota.

96 [Endorsed:] In the United States Supreme Court. The Red River Valley National Bank of Fargo, plaintiff in error, *vs.* Archibald J. Craig *et al.*, defendants in error. Citation. 741. Filed in the clerk's office, supreme court, State of North Dakota, Jan. 29, 1900. R. D. Hoskins, clerk. Mills, Resser & Mills, attorneys & counsellors at law, Red River Valley National Bank building, Fargo, North Dakota.

Endorsed on cover: File No., 17,691. North Dakota supreme court. Term No., 231. The Red River Valley National Bank of Fargo, plaintiff in error, *vs.* Archibald J. Craig, Menomonie Hydraulic Press Brick Co., *et al.* Filed March 27th, 1900.

No. 231.
By. of Clapp for P. C.
FILED
FEB 20 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed Feb. 20, 1901.

OCTOBER TERM, 1900.

No. 231.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., et al.

In Error to the Supreme Court of the State of North Dakota.

BRIEF OF PLAINTIFF IN ERROR.

Moses E. Clapp

IRA B. MILLS,
WILLIAM C. RESSER and
ERNEST B. MILLS,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO., and Others,

Defendants in Error.

STATEMENT OF CASE.

On July 8th, 1884, Elvira Cooper owned, in fee simple, Lot six (6) Block five (5) of the original Townsite of Fargo, Cass County, territory now State of North Dakota. On that date she and her husband executed to the Travelers Insurance Company of Hartford, Connecticut, a mortgage on said premises with other premises to secure an indebtedness of three thousand ($3,000) Dollars. The mortgage was recorded in the office of the Register of Deeds of the proper county on the 19th day

of July, 1884, in Book 16 of Mortgages, at page 341, thereafter and prior to January 1st, 1893, the mortgaged premises were sold and conveyed to the defendant Rosa Herzman, subject to the mortgage, and she remained the owner until the mortgage was foreclosed as hereinafter set forth.

At the time said mortgage was given and until June 7th, 1893, there was standing upon the mortgaged premises, a two story frame building one hundred and forty feet long and twenty-five feet wide. This building was destroyed by fire June 7th, 1893. Subsequent to its destruction and before the 3rd day of February, 1894, the defendant Rosa Herzman, the owner of the mortgaged premises, erected thereon a new two story—with basement brick building which is still standing on said premises. (Record pages 20-21, paragraphs 1 and 3.)

The east and west walls of said building are each party walls and were built in the summer of 1893, under an agreement with the owner of the mortgaged premises and the owners of the adjoining lots. The building in question and the building on either side, east and west, constitute a solid row of three brick buildings belonging to different owners, and the building in question is incapable of being removed from said lot unless it be first torn down. (Record page 28, paragraph 13).

In the erection of this building, the several defendants in error here, the plaintiffs in the State

Court or their assignors, either performed labor or furnished material under a contract with the then owner of the mortgaged premises, which were used in the construction of said building. The owner having failed to pay for the material and labor, the several defendants in error or their assignors, filed liens against the mortgaged premises including the building. All the material furnished and labor performed by the several defendants in error was furnished or performed subsequent to June 7th, 1893, and prior to February 3rd, 1894, and all liens therefor were filed between said dates. (Record pages 21 to 27 inclusive, paragraphs 4 to 11 inclusive.)

On May 7th, 1894, the mortgaged premises were duly sold to the Travelers' Insurance Company, the mortgagee named in said mortgage, for the sum of Three Thousand One Hundred Eleven and 15-100 ($3,111.15) Dollars in proceeding duly had by advertisement for the foreclosure of said mortgage, and on the 12th day of January, 1895, for a good and sufficient consideration, the certificate of sale issued to the purchaser at said foreclosure sale was duly assigned to the plaintiff in error. No redemption from said foreclosure sale was made, and on the 17th day of May, 1895,, a Sheriff's deed of the mortgaged premises was issued by the Sheriff of the proper county to the plaintiff in error and it has ever since held the title thereby acquired to said premises. (Record, page 21, paragraph 2).

November 15th, 1899,defendants in error brought

this action to foreclose the several liens hereinbefore mentioned. The Court found that it was for the best interest of all parties hereto, that the lot and building should be sold together, and that said lot and building are of equal value and each worth at least Two Thousand Five Hundred ($2,500) Dollars—and entered its decree adjudging the amount due the several defendants in error on account of their respective liens amounting in all to the sum of One Thousand One Hundred Eighty-two and 47-100 ($1,182.47) Dollars, and further adjudging and decreeing the following of which plaintiff in error complains.

FIRST. That defendants in error have a prior lien on the building for the amount found due them, and plaintiff in error a prior lien on the lot. (Record page 42, paragraph 8, Record pages 39 to 42, paragraphs 1 to 8).

SECOND. That unless the plaintiff in error on or before thirty days from the date of the service of a copy of the judgment upon it, pay or cause to be paid the judgments of the several defendants in error together with interest and costs, the premises in question and the improvements thereon be sold under the direction of the sheriff—and of the moneys received, one-half be paid and delivered to the plaintiff in error, and from the other one-half, each of defendants in error be paid the sum of his or its judgment with interest and costs and that any excess over the amount required to pay

the amount of said judgments and costs be paid to the plaintiff in error, its successors or assigns. (Record page 42, paragraph 9).

From this judgment, plaintiff in error appealed to the State Supreme Court and the judgment was by that Court in all things affirmed. The opinion of the Court will be found on pages 50 to 54 of the record.

At the time of the execution of the mortgage to the Travelers' Insurance Company of Hartford the statute of the territory of North Dakota governing the questions of mechanics' liens and their priority as to other encumbrances read: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement, sold under the execution and the purchaser may remove the same within a reasonable time thereafter." Code of Civil Procedure, § 666—Revised Codes of 1877, page 624.

This continued to be the law until January 1st, 1896, more than seven months after plaintiff in error's title had matured under the foreclosure of the mortgage. § 5480, Compiled Laws 1887.

On January 1st, 1896, what is known as the Revised Code of 1895 went into effect and contained

the following provisions, section 4795. "If such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement commenced since the attaching of such prior lien, encumbrance or mortgage the court may, in its discretion, order and direct such building, erection or improvement to be separately sold under execution and the purchaser may remove the same within such reasonable time as the court may fix. *But if in the opinion of the court it would be for the best interest of all parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate value of the land and of the erection, building or other improvement and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanics lien, priority on the building, erection or other improvement.*" It was under the provisions of the statute printed in italics that the court entered the judgment directing the sale of the premises and the payment of defendants in error's liens as above stated was made and this we claim to have impaired the obligation of the contract contained in the mortgage in question.

In case the court should wish to examine the several lien laws referred to we have had them printed in full as an appendix to this brief. "A" on page 20 is the law in existence on July 24, 1884, the

date the mortgage was given and is known as Chap. 31 of theCode of Civil Procedure, and is found on pages 622 to 625 of the Revised Codes of 1877. "B," page 27 is the law in force when the work was done and material furnished that was the foundation for the liens of the several defendants in error and was still known as Chapter 31 of the Code of Civil Procedure and sections 5468 to 5487 inclusive, of the Compiled Laws of 1887. This law was repealed by the revision of 1895. which took effect January 1st, 1896. (Record page 53, fol. 79). C, page 34 is the law as found in the revision of 1895 and is known as Chap. 77 of the Civil Code, or sections 4788 to 4901 of the Revised Codes of 1895. D, page 42, sections 5411 to 5423, contains the provisions of the compiled laws of 1887 being the law as it existed at the date of the foreclosure of the mortgage and under which it was foreclosed.

ASSIGNMENTS OF ERROR.

The plaintiff in error respectfully submits that the supreme court of the state of North Dakota erred, in this:

FIRST. In holding, adjudging and deciding that the claims for liens of the several defendants in error were prior liens on the building erected on the lot described in the complaint in this suit to the lien of the mortgage executed by Elvira Cooper to the Travelers' Insurance Company of Hartford,

Connecticut, and recorded in the office of the Register of Deeds of Cass county, in the territory of Dakota, July 19th, 1884, in Book 2 Mortgages, on page 341. Record pages 39 to 42, paragraphs 1 to 8 inclusive.

SECOND. In deciding, decreeing and adjudging that unless the Red River Valley National Bank of Fargo pay the defendants in error (the plaintiffs in the State courts) the amounts found due on their several claims for liens that the premises described in the complaint, to-wit, lot six (6), in block five (5), of the original town site of Fargo, North Dakota, together with the building and improvements thereon, be sold in the manner provided by law for the sale of real property on execution, and of the moneys received one-half to be paid to the Red River Valley National Bank of Fargo, and from the other half each of the defendants in error here (the plaintiffs in the State courts) be paid the sum of his or its judgment, together with costs, in the order and manner specified in the ninth subdivision of said judgment, and any excess over and above the amount required to pay said judgments and costs be paid and delivered to the Red River Valley National Bank, its successors or assigns. Record page 42, paragraph 9.

THIRD. In holding, adjudging, and deciding that part of section 4795 of the 1895 Revised Codes of the State of North Dakota, viz., "But if in the opinion of the court it would be for the best inter-

ests of all parties that the land and improvements thereon should be sold together, it shall so order, and the court shall take an account and ascertain the separate values of the land and of the erection, buildings or other improvements, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanics' lien, priority upon the building, erection or other improvements," was not a violation of section ten of article one of the Constitution of the United States, in so far as it applied to the mortgage described in the first assignment of error and the title of the Red River Valley National Bank of Fargo acquired under a foreclosure of said mortgage.

FOURTH. That by the record herein it appears that judgment was given for Archibald J. Craig, Menomonie Hydraulic Press Brick Co., F. X. Goulet, Horace Hance and Edward B. Hance, Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, Matt Nuremberg, Frank Porwoll and A. Gruber against the Red River Valley National Bank of Fargo, whereas by the law of the land the said judgment ought to have been given for the said The Red River Valley National Bank of Fargo against Archibald J. Craig, Menomonie Hydraulic Press Brick Co., F. X. Goulet, Horace Hance, Edward B. Hance, Fargo Gas & Electric Co., Henry E. Magill, S. F. Remer, Matt Nuremberg, Frank Porwoll and A. Gruber.

And the plaintiff in error specifies and urges each of the foregoing errors as reasons why the judgment of the Supreme Court of North Dakota should be reversed.

ARGUMENT.

That part of section 4795 of the revised codes of 1895 which provides "But if in the opinion of the court it would be for the best interest of all parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate value of the land and of the erection, building or other improvement and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanic's lien priority upon the building, erection or other improvement" is as against the mortgage given by the owner of the real property to the Travelers' Insurance Company July 8th, 1884, and the title acquired by plaintiff in error under a foreclosure of that mortgage in violation of that part of section 10 of Article I of the Constitution of the United States which forbids the states from passing any law impairing the obligations of contracts, and it is also repugnant to that part of the fourteenth amendment which prohibits the depriving a person of life, liberty or property without due process of law.

In determining this question we must bear in mind three undisputed facts:

First: The giving of the mortgage July 8th, 1884. Record page 20.

Second: That at this date and until January 1st, 1896, the law only authorized the sale and removal of the building as the means of enforcing its priority of mechanic's lien as against mortgages existing before the right to a lien accrued.

Third. The sale of the mortgaged premises under foreclosure proceedings May 7th, 1894, the expiration of the time of redemption and the giving of the sheriff's deed May 17th, 1895.

At the time of the execution of the mortgage under which plaintiff in error claims title, the right to foreclose by advertisement was governed by Chapter 28 of the Code of Civil Procedure, which among other things provided, Section 597: "Every mortgage of real property containing therein the power of sale, upon default being made in the condition of such mortgage, may be foreclosed by advertisement in the case and manner hereinafter specified."

Then after providing in several sections the facts that must ~~exist~~ exist in order to entitle the mortgagee to foreclose—that foreclosure can be had for each installment giving the requisites of the notice of sale, the manner of conducting it and providing for postponements, the separate sale for different

tracts and that the mortgagor might become a purchaser. The following provisions are found:

§ 606. Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage, the officer or person making the sale shall immediately give to the purchaser a certificate of sale containing

1. A particular description of the real property sold.

2. The price bid for each distinct lot or parcel.

3. The whole price paid.

And such officer or person shall file in the office of the register of deeds where the mortgage is recorded, within ten days from the day of sale, a duplicate of such certificate, which certificate must be executed and acknowledged and may be recorded as provided in case of a certificate of the sale of real property upon execution and shall have the same validity and effect.

§ 607. The property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter XIII of this Code for redemption of real property sold upon execution so far as the same may be applicable, by

1. The mortgagor or his successors in interest in the whole or any part of the property.

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold, such creditor is termed a redemptioner, and has all the rights of a redemptioner under that chapter.

And the mortgagor and his successor in interest, has all the rights of the judgment debtor and his successor in interest as provided therein.

§ 608. Provides for the notice to be given to the officer in case of redemption.

§ 609. If such mortgaged premises be not redemed, it shall be the duty of the officer, or his successor in office, or other person, who sold the same, or his executors or administrators, or some other person appointed by the district court for that purpose, to complete such sale, by executing a deed of the premises, so sold to the original purchaser, his heirs or assigns or to any person who may have acquired the title and interest of such purchaser by redemption or otherwise."

The foregoing provisions were substantially embodied in the compiled laws of 1887 and were the law when the mortgage in question was foreclosed. §§ 5411, 5420, 5421, 5423 of the compiled laws of 1887 see appendix, E page.

Although the mortgage does not appear in the record there is no doubt but it contained a power of sale and was subject to foreclosure by advestisement we find in the findings of the trial court: "That on the 7th day of May, 1894, the premises in the complaint described were sold by the sheriff of Cass County to the Travelers' Insurance Company of Hartford, Connecticue, under proceedings

duly had by advertisement for the foreclosure of said mortgage on said premises." (Record page 21, paragraph 2) and in the opinion of the Supreme Court: "True, as to the mortgagor the rights under the mortgage have ripened into title; his right of redemption has been foreclosed." (Record page 52, Fol. 77.) This could not be so unless the mortgage contained the power of sale which both the state trial and Supreme Court recognized by finding a regular foreclosure sale the issuing of the proper certificate and giving of the deed.

We contend that the remedy given by the statute to foreclose the mortgage by advertisement under the power of sale which includes the sale the certificate and the deed on the expiration of the period allowed for redemption, are all parts of the mortgage contract, and any law that interferes with, renders less valuable or divests the title acquired under a foreclosure by virtue of the statutory remedy, impairs the obligation of the contract and is therefore void.

In Ganleys v. Ewing, 3 Howard 613-717 where the state statute was amended requiring that no property should be sold on execution for less than one-half its cash value at the time of sale to be ascertained by three freeholders. In holding that this impaired the obligation of the mortgage contract this court says:

"The decree ordering foreclosure was made in conformity to existing laws, at the date of the mortgage and of the decree. An execution sale

was the appropriate mode of foreclosure, and this without any of the restrictions contained in the act of 1831, c. 36. The contract of mortgage was a vested interest and its main incident a right to have the land applied in discharge of the debt, either by an execution, executed as on judgment at law, or in some form of remedy substantially equal. The new remedy prescribed by the act of 1841 changed the contract and required among other things that the mortgaged premises should not be sold to satisfy the debt unless they were first valued, and one-half of that value was bid for them. If the legislature could make this alteration in the contract and in the decree enforcing it, so it could declare the property should bring the entire value or that it should not be sold at all thereby impairing or defraying the obligation under the disguise of regulating the remedy. The Court held in Bronson v. Kinzie, 1 Howard 311, that the right and remedy substantially in accordance with the right were equally parts of the contract, secured by the laws of the state where it was made; and that the change of these laws imposing conditions and restrictions on the mortgagee in the enforcement of his contract and which affects its substance, impaired the obligation and could not prevail. As an act directly prohibited cannot be done indirectly."

In Bronson v. McKinzee, supra, a subsequent state law declared that the equitable estate of the mortgagor shall not be extinguished for twelve months after sale under decree and prevented a sale at all unless two-thirds of the amount at which the property had been valued by appraisers had been bid.

In O'Brien v. Krenz, 25 Minnesota 136, the Supreme Court of that state having under considera-

tion the effect of the repeal of a statute authorizing statutory foreclosure, say:

"It may be inferred from the act, though it does not say so, that the purpose was to abolish foreclosures under powers of sale * * *

"Taking this to have been what the legislature intended, we are met by the objection that, while it might abolish such foreclosures as to all mortgages executed after its passage, it could not do so as to mortgages containing powers of sale executed prior to the passage. All substantial provisions of the law regulating such foreclosures, in force when the mortgages were executed,—that is, all provisions not mere matters of form, but materially affecting the right to foreclose under the powers, or the rights of the parties, mortgagors and mortgagees upon such foreclosures—became part of the contract between the parties, and, so far as they were concerned could not be impaired by future legislation."

The right to foreclose under the power and the title acquired under such foreclosures being a part of the mortgage contract, it is self evident that that it was impaired by the statute if it has been properly construed by the state supreme court. One of the most important rights of the mortgagee under the mortgage contract was in case of default to foreclose against the mortgaged premises which was in the first place the naked lots. This he did and obtained title before the passage of the lien statute allowing a sale of the entire premises and proportionate valuation, and the payment of lien holders out of the porportionate value allotted to the building.

The judgment of the state court sets aside the foreclosure as against the lot, forces plaintiff in

error to part with a title that he acquired by the legitimate exercise of his contract rights and accept in stead such sum as the court may find the value of the lot to be in proportion to the value of the whole property.

This court cannot sustain this judgment unless it holds that the filing of the liens destroyed the mortgagee's right to foreclose and obtain a title to the lots, its original security. Such holding would be in conflict with all the holdings of this court for it has said "one of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroachment in any respect on its obligation dispensing with any part of its force. Edwards v. Kearzey, 96 U. S. 595-601. Can it be said that a statute that renders a foreclosure against the lot on which the mortgage was given ineffectual by allowing the title acquired by such foreclosure to be divested by the foreclosure of a mechanic's lien filed eleven years subsequent to the giving of the mortgage does not weaken the mortgage security and make it less valuable and thus impair the obligation of the mortgage contract? We submit that it destroys a vested right acquired by plaintiff in error under the mortgage. The mortgagee, his successors and assigns are entitled to a remedy substantially equal to that in existence when the mortgage was given. Grantleys v. Ewing, supra.

In Taylor v. Stearns, 18 Grattan, Va. 288, the learned court, after citing the United States cases Gantley's, lessees, v. Ewing, 3 Howard 707; Planters Bank v. Sharp, 6 Ib. 301; Curren v. State of Arkansas, 15 Ib. 319; Bugbee, 24 Ib. 461; Hawthorne v. Cliff, 2 Wallace 10, says:

"From these authorities, and nearly in their language, I deduce the settled rule of that court to be this: That wherever a subsequent law affects to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, through professing to act only on the remedy is directly obnoxious to the prohibition of the constitution."

Any law impairs the obligation which renders the contract in itself less valuable or less enforceable whether by changing its terms and stipulations, its legal qualities and conditions or by regulating the remedy for its enforcement. The degree to which the contract is impaired, the maner or cause, is not the matter to be considered but merely whether in any respect the obligation has been encroached upon or its binding power to any extent diminished. Rutland v. Copes, 15 Richardson (S. C. 105).

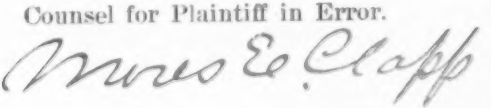
Remedial statutes come within the prohibition of the Constitution if they so change the nature and extent of existing remedies as to impair the rights and interests of the owner they are just as much a violation of the contract as if they directly overturned its rights.

Greene v. Bibble, 8 Wheaton 1.

II.

The statute violates that part of the fourteenth amendment of the federal constitution which forbids the taking of property without due process of law. In this it destroys by a legislative act a title to property duly and legally acquired under the laws of the state.

IRA B. MILLS,
WILLIAM C. RESSER and
ERNEST B. MILLS,
Counsel for Plaintiff in Error.



APPENDIX A.

The Mechanics' Lien Law in existence July 8th, 1884, when mortgage was given, being chapter 31 of the Code of Civil Procedure, as found in the Revised Codes of 1877.

CHAPTER XXXI.

Action to Enforce Mechanics' Liens.

Sec. 654. No Lien.

No person is entitled to a mechanic's lien who takes collateral security on the same contract.

Sec. 655. Lien to whom and for what.

Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for any building, erection or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished.

Sec. 656. Proceedings by subcontractor.

Every subcontractor wishing to avail himself of the benefits of this chapter, shall give notice to

the owner, his agent or trustee, before or at the time he furnishes any of the things aforesaid or performs any labor, of his intention to perform the same, and the probable value thereof; and if afterwards the things are furnished or labor done, the subcontractor shall settle with the contractor therefor, and the settlement in writing, signed by the contractor and certified by him to be just, shall be given to the owner, his agent or trustee; within thirty days from the time the things shall have been furnished or the labor performed, the subcontractor shall file with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement is situated, a copy of such settlement, which shall be a lien on such building, erection or other improvement for which the things were furnished or the labor performed; and shall at the time file a correct description of the property to be charged with the lien, the correctness of which shall be verified by affidavit.

Sec. 657. Notice presumed—Lien filed in sixty days—Limitation.)

Every railway owner, company or contractor, and subcontractor upon any railway shall be deemed to have the notice provided for by the preceding section for a period of sixty days from the last day of the month in which such labor was done, or material furnished, during which period any person who has performed such labor or furnished such material, may file a lien with the clerk

of the district court as provided in the preceding section, which lien shall be binding upon the erection, excavation, embankment, bridge, road bed or right of way, and upon all land upon which the same may be situated, to the full value of such labor or material, in the county or judicial subdivision in which the same is filed. In case the lien is sought to be enforced against the owner, the liability shall not be greater than his liability would have been to the owner at the time the labor was performed or material furnished; but the liability of the owner, in case actual notice shall be given after the sixty days, shall be the same as provided in this chapter.

Sec. 658. Lien in Six Months—Affidavit—Statement.

Every subcontractor may, at any time within six months after his labor is performed or materials furnished, make a statement thereof in writing, supported by affidavit that the same is just and true, and file the same with the clerk of the district court of the proper county, or judicial subdivision, and give notice thereof, with a copy of such statement to the owner, his agent or trustee, and to the contractor; and from and after the service of such notice, his lien therefor, shall have the same force and effect, and be prosecuted in a like manner as a lien by the contractor, but shall be enforced against the property only to the extent of the balance due to the contractor at the time of the service of such notice upon the owner, his agent or trustee.

Sec. 659. If Settlement Refused.

In case the contractor shall refuse to make and sign such settlement, then the subcontractor may make a just and true statement of the labor done, or things furnished, giving all credits, which he shall present to the owner, his agent or trustee, and shall also within said thirty days file a copy of the same, verified by affidavit, with the clerk of the district court of the county or judicial subdivision in which the building, erection, or other improvement is situated, together with a correct description of the property to be charged with the lien.

Sec. 660. Effect of Certificate.

The certificate of settlement or statement of the sub-contractor, shall be a justification to the owner in withholding from the contractor the amount appearing thereby to be due the subcontractor until the same has been paid and the owner shall become the surety of the contractor to the subcontractor for the amount due to the extent before provided.

Sec. 661. Service of Notices.

The notices mentioned in this chapter may be served by any sheriff or constable, and the return thereon shall be received in evidence without further proof.

Sec. 662. Liens of Other Persons.

Every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, may file with the clerk

of the district court of the county or judicial subdivision in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except against purchasers or encumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed.

Sec. 663. Clerk's Record—Entries.

The clerk of the district court shall indorse upon every account the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indorsed, containing the date of its filing, the name of the person filing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

Sec. 664. Priority of Liens.

The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon said building, erection or other improvement, and to the land on which the same

is situated, or either of them, made subsequent to the commencement of said building, erection or other improvement.

Sec. 665. Extent of Liens—On Leased Land.

The entire land upon which any such building, erection or other improvement is situated, including that portion of the same not covered therewith shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in said land by such owner of such building, erection or other improvement, is only a leasehold interest, the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy said lien, and be removed within thirty days after the sale thereof by the purchaser.

Sec. 666. Lien Superior to Mortgage When.

The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection or other improvement, sold

under execution, and the purchaser may remove the same within a reasonable time thereafter.

Sec. 667. Action to Enforce.

Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court of the county or judicial subdivision wherein the property is situated.

Sec. 668. Demand Upon Lienor.

Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien; such suit shall be commenced in thirty days thereafter or the lien shall be forfeited.

Sec. 669. Owner Defined.

Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word owner thereof.

Sec. 670. Satisfaction of Liens—Penalty.

Whenever a lien has been claimed by filing the same in the clerk's office, and it is afterwards paid, the creditor shall acknowledge the satisfaction thereof on the proper book in such office, or otherwise in writing, and if he neglects to do so for ten days after demand, he shall forfeit and pay twenty-five dollars to the owner or contractor, and be liable to any person injured to the extent of the injury.

Sec. 671. Subcontractors Defined.

All persons furnishing things or doing work provided by this chapter, shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

APPENDIX B.

Sections 5468 to 5485, Compiled Laws of 1887, being the mechanic's lien law in force when the work was done and materials furnished, and under which liens in question were filed.

Sec. 5468. No person is entitled to a mechanic's lien who takes collateral security on the same contract.

Sec. 5469. Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished; provided, that the provisions of this section and chapter shall not be con-

strued to apply to claims or contracts for furnishing lightning rods or any of their improvement.

Sec. 5470. Every sub-contractor wishing to avail himself of the benefits of this chapter, shall, within sixty days after the material shall have been furnished or labor performed, file with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement to be charged with the lien is situated, a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by his affidavit. But a failure to file the same within the time aforesaid shall not defeat the lien except as against purchasers or incumbrancers in good faith and without notice whose rights accrued after the sixty days, and before any claim for the lien was filed, or against the owners, except the amount due to contractor at the time of filing the same.

Sec. 5471. Every railway owner, company or contractor, and sub-contractor upon any railway, shall be deemed to have the notice provided for by the preceding section for a period of sixty days from the last day of the month in which such labor was done, or material furnished, during which period any person who has performed such labor or furnished such material, may file a lien with the clerk of the district court as provided in the preceding section, which lien shall be binding upon the erection, excavation, embankment, bridge,

road bed or right of way, and upon all land upon which the same may be situated, to the full value of such labor or material, in the county or judicial subdivision in which the same is filed. In case the lien is sought to be enforced against the owner, the liability shall not be greater than his liability would have been to the owner at the time the labor was performed or material furnished; but the liability of the owner in case actual notice shall be given after the sixty days, shall be the same as provided in this chapter.

Sec. 5472. Every sub-contractor may, at any time within six months after his labor is performed or materials furnished, make a statement thereof in writing, supported by affidavit, that the same is just and true, and file the same with the clerk of the district court of the proper county or judicial sub-division, and give notice thereof, with a copy of such statement to the owner, his agent or trustee, and to the contractor; and from and after the service of such notice, his lien therefor, shall have the same force and effect, and be prosecuted in like manner as a lien by the contractor, but shall be enforced against the property only to the extent of the balance due to the contractor at the time of the service of such notice upon the owner, his agent or trustee.

Sec. 5473. In case the contractor shall refuse to make and sign such settlement, then the sub-contractor may make a just and true statement of the labor done, or things furnished, giving

all credits, which he shall present to the owner, his agent or trustee, and shall also within said thirty days file a copy of the same, verified by affidavit, with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement is situated, together with a correct description of the property to be charged with the lien.

Sec. 5474. The certificate of settlement or statement of the sub-contractor, shall be a justification to the owner in withholding from the contractor the amount appearing thereby to be due the sub-contractor until the same has been paid, and the owner shall become the surety of the contractor to the sub-contractor for the amount due to the extent before provided.

Sec. 5475. The notices mentioned in this chapter may be served by any sheriff or constable, and the return thereon shall be received in evidence without further proof.

Sec. 5476. Every person, except as has been provided for sub-contractors, who wishes to avail himself of the provisions of this chapter, may file with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him after allowing all credits, and containing

a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien except against purchasers, or incumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed.

Sec. 5477. The clerk of the district court shall indorse upon every account the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indorsed, containing the date of its filing, the name of the person filing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

Sec. 5478. The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof, as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon said building, erection or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or other improvement.

Sec. 5479. The entire land upon which any such building, erection or other improvement is situated, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the owner thereof,

for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in said land by such owner of such building, erection or other improvement, is only a leasehold interest, the forfeiture of such lease for the non-payment of rent, or for non compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy said lien and be removed within thirty days after the sale thereof by the purchaser.

Sec. 5480. The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

Sec. 5481. Any person having a lien by virtue of this article may bring an action to enforce the same in the district court of the county or judicial subdivision where the property is situated, and any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court may also allow as part of the costs the money paid for filing each

lien and the sum of five dollars for drawing the same.

Sec. 5482. Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien, such suit shall be commenced within thirty days thereafter, or the lien shall be forfeited.

Sec. 5483. Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors, or other persons, shall be included in the word "owner" thereof.

Sec. 5484. Whenever a lien has been claimed by filing the same in the clerk's office, and it is afterwards paid, the creditor shall acknowledge the satisfaction thereof on the proper book in such office, or otherwise in writing, and if he neglects to do so for ten days after demand, he shall forfeit and pay twenty-five dollars to the owner or contractor, and be liable to any person injured to the extent of the injury.

Sec. 5485. All persons furnishing things, or doing work provided for by this chapter, shall be considered sub-contractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

APPENDIX C.

Mechanics' Lien Law, taking effect January 1st, 1896; being Sections 4788 to 4801, Revised Codes 1895. It is the law under which this action was brought.

MECHANIC'S LIENS.

Sec. 4788. Who May Have and for What.

Any person who shall perform any labor upon or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement for the erecting alteration or repair of any building or other structures upon land, or in making any other improvement thereon, including fences, sidewalks, paving, wells, trees, drains, grades or excavations under a contract with the owner of such land, his agent, trustee, contractor or sub-contractor or with the consent of such owner, shall upon complying with the provisions of this chapter have for his labor done, or materials, machinery or fixtures furnished a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated, or to improve which the work was done or the things furnished, to secure the payment for such labor, materials, machinery or fixtures. The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement, if at the time he had knowledge thereof and did not give notice of his objection thereto to the person entitled to the lien. The pro-

visions of this section and chapter shall not be construed to apply to claims or contracts for furnishing lightning rods or any of their attachments.

Section 4789. Single Contract for Several Buildings.

If labor is done or materials furnished under a single contract for several buildings, erections or improvements, the person furnishing the same shall be entitled to a lien therefor as follows:

1. If such buildings, erections or improvements are upon a single farm, tract or lot, upon all such buildings, erections and improvements and the farm, tract or lot upon which the same are situated.

2. If such buildings, erections or improvements are upon separate farms, tracts or lots, upon all such buildings, erections and improvements, and the farms, tracts or lots upon which the same are situated; but upon the foreclosure of such lien the court may in the cases provided for in this subdivision apportion the amount of the claim among the several farms, tracts or lots in proportion to the enhanced value of the same produced by means of such labor or materials, if such apportionment is necessary to protect the rights of third persons.

Sec. 4790. On Railway Contracts.

Every person who furnishes any labor, skill or material for constructing, altering or repairing any line of railway or any improvement or structure appertaining to any line of railway or any improvement or structure appertaining to any line of rail-

way by virtue of any contract with the owner, his agent, contractor or sub-contractor shall have a lien upon such line of railway and the right of way thereof, and upon all bridges, depots, offices and other structures appertaining to such line of railway and all franchises, privileges and immunities granted to the owner of such line of railway for the construction and operation thereof to secure the payment for such labor, skill and materials upon filing a statement of his demand therefor in accordance with the provisions of the next section within ninety days from the last day of the month in which such labor and material was furnished; but a failure to file the same within the time aforesaid shall not defeat the lien except to the extent specified in the next section.

Sec. 4791. Account to be Filed With Clerk.

Every person who wishesto avail himself of the provisions of this chapter, shall file with the clerk of the district court of the county or judicial subdivision in which the property to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done a just and true account of the demand due him after allowing all credits and containing a correct description of the property to be charged with such lien and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and for value whose rights accrue after the ninety

days and before any claim for the lien is filed, or as against the owner except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same.

Sec. 4792. Clerk's Record of Liens.

The clerk of the district court shall indorse upon every account the date of its filing and make an abstract thereof in a book to be kept by him for that purpose and properly indexed, containing the date of its filing, the name of the person filing the lien, the amount of such lien, the name of the person against whose property the lien is filed and a desrription of the property to be charged with the same.

Sec. 4793. Priority of Mechanic's Liens.

Liens under the provisions of this chapter shall have priority in the following order:

1. For manual labor.
2. For materials.
3. Subcontractors, other than manual laborers.
4. Original contractors.

Liens in the same class filed within the ninety days shall share ratably in the security; but liens in the same class filed thereafter shall have priority in the order of the filing of the accounts thereof as aforesaid. Liens under the provisions of this chapter shall be preferred to all other liens or incumbrances upon such building, erection or other improvement and the land on which the same is situated, or to improve which the labor was done or things furnished, or either of them, filed or

docketed subsequent to the commencement of such building, erection or other improvement.

Sec. 4794. Land Subject to Lien.

The entire land upon which any such building, erection or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter to the extent of all the right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in such land by such owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the non-payment of rent or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such lien so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser.

Sec. 4795. When Prior to Prior Lien on Land. Power of Court.

The liens for the things aforesaid or the work, including liens for additions, repairs and betterments shall attach to the building, erection or improvement for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which such erection,

building or improvement belongs or is erected or put.

If such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement commenced since the attaching of such prior lien, incumbrance or mortgage, the court may, in its discretion, order and direct such building, erection or improvement to be separately sold under execution and the purchaser may remove the same within such reasonable time as the court may fix. But if in the opinion of the court it would be for the best interest of all parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate values of the land and of the erection, building or other improvement, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanic's lien priority upon the building, erection or other improvement.

If the material furnished or labor performed was for an addition to, repairs of, or betterments upon buildings, erections or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs or beterments, and upon the sale of the premises distribute the proceeds of sale so as to secure to the prior mortgage or lien priority upon the land and improvements as they existed prior

to the attaching of the mechanic's lien and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs or betterments.

Sec. 4796. Action to Enforce. Fee for Lien.

Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court in the county or judicial subdivision in which the property is situated, and any number of persons claiming liens against the same property may join in the same action and when separate actions are commenced the court may consolidate them. Whenever in the sale of the property subject to the lien there is a deficiency of the proceeds, judgment may be entered for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages. The court shall also allow as part of the costs the money paid for filing each lien and the sum of five dollars for drawing the same.

Sec. 4797. Requiring Suit to be Commenced. Assignment of Claims.

Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien, such suit shall be commenced within thirty days thereafter, if the debt for which the lien is security is due, and if not due, within thirty days after the same becomes due or the lien shall be forfeited. All claims for which liens may be or have been filed and rights of action to recover therefor under this chapter may be assigned by an

instrument in writing and such assignment shall vest in the assignee all rights and remedies herein given, subject to all defences that might have been interposed, if such assignment had not been made.

Sec. 4798. Owner Defined.

Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word "owner" thereof.

Sec. 4799. When Discharge May be Required. Penalty.

Whenever a lien has been claimed by filing the same in the clerk's office and it is afterwards paid, or more than thirty days have elapsed after the service of the demand mentioned in section 4797 without the commencement of an action to enforce the lien, the holder thereof shall upon demand of any person entitled to have such lien discharged and upon payment of the expenses thereof discharge the same, either on the proper book in such office or by an instrument acknowledged or proved in the same manner as the satisfaction of a mortgage, and if he neglects to do so for ten days after such demand, he shall forfeit one hundred dollars to the person entitled to such discharge and be liable to any person injured to the extent of the injury.

Sec. 4800. Subcontractor Defined.

All persons furnishing things or doing work

provided for by this chapter shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

Sec. 4801. When Taking Collateral Security Does Not Impair Right.

The taking of collateral or other security for an indebtedness, for which a lien might be claimed under the provisions of this chapter, shall in no way impair the right to such lien, unless such security shall be by express agreement given and received in lieu of such lien.

APPENDIX D.

Statute under which mortgage was foreclosed, Chapter 28, Compiled Laws of 1887, Article 1, Foreclosure by Advertisement.

Sec. 5411. Every mortgage of real property containing therein a power of sale, upon default being made in the condition of such mortgage, may be foreclosed by advertisement, in the cases and manner herein specified; *provided*, that when the mortgagee or his assignee has commenced procedure by advertisement, and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counter claim or any other valid defense

against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may by an order to that effect enjoin the mortgagee or his assignee from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject matter; and for the purpose of carrying out the provisions of this act, service may be made upon the attorney or agent of the mortgagee or assignee.

Sec. 5412. To entitle any party to give notice, as hereinafter prescribed, and to make such foreclosure it shall be requisite:

1. That some default in a condition of such mortgage shall have accrued, by which the power to sell has become operative.

2. That no action or proceedings shall have been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or, if any action or proceeding has been instituted, that the same has been discontinued, or that an execution, upon the judgment rendered therein, has been returned unsatisfied, in whole or in part; and

3. That the mortgage containing such power of sale has been duly recorded, and, if it shall have been assigned, that all of the assignments thereon have been duly recorded, in the county where such mortgaged premises are situated.

Sec. 5413. In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage, after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage, for each of such installments, may be foreclosed in the same manner; and with like effect, as if such separate mortgage were given for each such subsequent installment; and a redemption of any such sale shall have the like effect as if the sale for such installment had been made upon a prior, independent mortgage.

Sec. 5414. Notice that such mortgage will be foreclosed, by sale of the mortgaged premises, or some part of them, must be given, by publishing the same, for six successive weeks, at least once in each week, in a newspaper of the county where the premises intended to be sold, or some of them, are situated, if there be one, and if not, then in the nearest newspaper published in the territory.

Sec. 5415. Every notice must specify:

1. The names of the mortgagor and mortgagee, and the assignee, if any.

2. The date of the mortgage.

3. The amount claimed to be due thereon at the date of the notice.

4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage; and

5. The time and place of sale.

Sec. 5416. The sale must be at public auction,

between the hours of nine o'clock in the forenoon and the setting of the sun on that day, in the county in which the premises to be sold, or some part of them, are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff or his deputy of the county, to the highest bidder.

Sec. 5417. Such sale may be postponed, from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until such time to which the sale shall be postponed, at the expense of the party requesting such postponement.

Sec. 5418. If the mortgaged premises consist of distinct farms, tracts or lots, they must be sold separately, and no more farms, tracts or lots must be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law.

Sec. 5419. The mortgagee, his assigns, or their legal representatives, may, fairly, and in good faith, purchase the premises so advertised, or any part thereof, at such sale.

Sec. 5420. Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage, the officer or person making the sale shall immediately give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.

2. The price bid for each distinct lot or parcel.

3. The whole price paid.

And such officer or person shall file in the office of the register of deeds, where the mortgage is recorded, within ten days from the day of sale, a duplicate of such certificate; which certificate must be executed and acknowledged, and may be recorded as provided in case of a certificate of sale of real property upon execution and shall have the same validity and effect.

Sec. 5421. The property sold may be redeemed within one year from the day of sale, in like manner and to the same effect as provided in chapter 13 of this code, for redemption of real property sold upon execution, so far as the same may be applicable, by:

1. The mortgagor, or his successor in interest in the whole or any part of the property.

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Such creditor is termed a redemptioner, and has all the rights of a redemptioner under that chapter.

And the mortgagor and his successor in interest has all the rights of the judgment debtor and his successor in interest, as provided therein.

Sec. 5422. The notice of redemption required to

be given to the sheriff under that chapter, may, in foreclosure by advertisement, be given to the officer or person making the sale.

Sec. 5422. If such mortgaged premises be not redeemed, it shall be the duty of the officer or his successor in office, or other person who sold the same, or his executors or administrators, or some other person appointed by the district court for that purpose, to complete such sale, by executing a deed of the premises so sold to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser by redemption or otherwise.

No. 231.

FILED
APR 8 19
JAMES H. McKENNEY
C

Reply Brief of Mills for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 231.

Filed April 8, 1901.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG and Others,

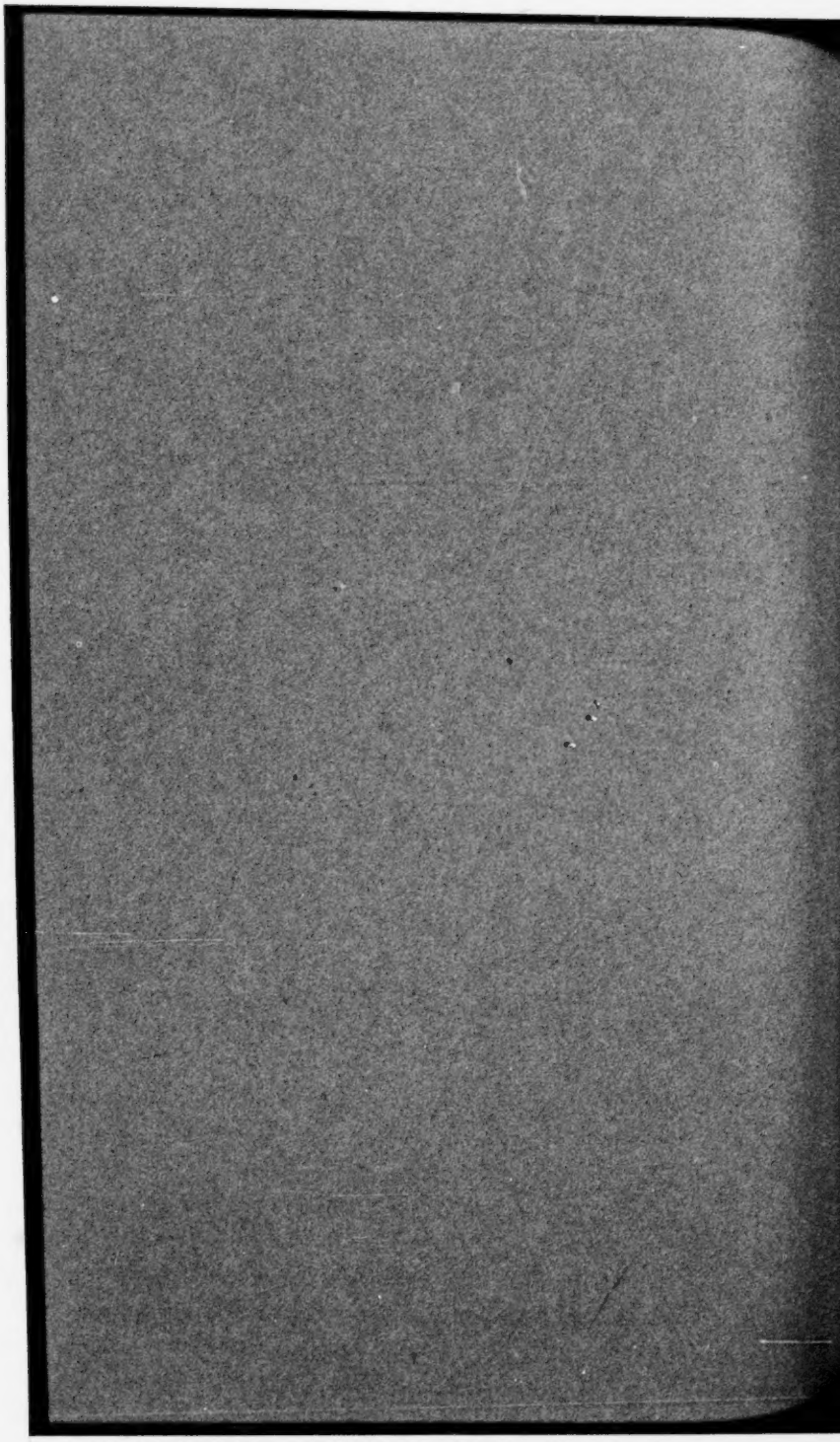
Defendants in Error.

IN ERROR TO SUPREME COURT OF NORTH DAKOTA.

REPLY BRIEF.

IRA B. MILLS,
WILLIAM C. RESSER and
ERNEST B. MILLS,
Counsel for Plaintiff in Error.

17,691.



Supreme Court of the United States.

OCTOBER TERM, 1900.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG and Others,

Defendants in Error.

ARGUMENT IN REPLY.

The plaintiff in error begs to submit the following in reply to the argument of defendants in error:

I.

The defendant in error has called attention to Sec. 614 of the Code of Civil Procedure of North Dakota which provides in substance that the affidavit and deed in case of statutory foreclosure shall vest in the purchaser or person acquiring the title thereto, by redemption or otherwise, the same force and validity as the deed on foreclosure by action.

Section 623 provides what effect the deed in foreclosure by action shall have in the following language * * * "if the same be not redeemed, the

person or officer making the sale or his successors in office, or other officer appointed by the court, must make to the purchaser or purchasers, their heirs or assigns, or to any person acquiring the title of such purchaser by redemption or otherwise, a deed or deeds to such premises which shall vest in the purchaser or other party entitled thereto, the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or any time thereafter; and such deed shall be as valid as if executed by the mortgagor and mortgagee and shall be a complete bar against each of them." * * *

The language used is plain and not open to construction, it means the deed shall pass the title the mortgagor had at the date of the execution and delivery of the mortgage.

If the construction contended by defendants in error is to prevail a deed made in a foreclosure in equity would only pass what title the mortgagor had at the date of the sheriff's deed, and if the mortgagor had conveyed the land after the mortgage and prior to the deed in the foreclosure proceedings, the deed issued in such proceedings would convey no title whatever. Defendants in error's contention is so absurd and manifestly unjust that it never could have been the intention of the framers of the statute.

In the case at bar the mortgagor had the fee at the time of giving the mortgage and under the foreclosure proceedings that title was acquired by plaintiff in error and is protected by the constitution.

II.

Plaintiff in error's rights were derived under the mortgage and it has succeeded to all the rights of the mortgagee. At the date of the mortgage and at the time it was foreclosed the mortgagee had the right in foreclosure proceedings to have the premises sold and the proceeds applied to the payment of the debt, without having the value of the lot and building ascertained and the amount apportioned between the mortgagee and the lien-holders. The lien-holders could foreclose and sell subject to the mortgage, or they could sell the building and remove it.

Each lien-holder could foreclose against the property on which he held the first lien and the purchaser would acquire a title as against the subsequent lien. In order to make a clear title to the lot under foreclosure of the mechanics liens, the mortgage would have to be paid. This was the law at the time the mortgage was given and no question is made but what it so continued up to January 1st, 1896. The change in the law rendered the mortgage security less valuable; no investor can be found that would give as much for the security if it is subject to the provisions of the statute of 1895 as they would if it was only subject to the provisions of the law in force when the mortgage was given, allowing a sale and removal of the building. The value of the mortgage contract having been diminished by the statute the legislation is in conflict with the constitution under the holding in Edwards v. Kearzey, 96 U. S. 595, cited in former brief.

III.

The defendants in error have made some suggestion that as the mortgage is not contained in the record this court will not decide the question of impairment of the contract.

The record shows that Elvira Cooper and her husband executed a mortgage to the Travelers Insurance Company to secure the payment of $3,000 (Finding 1, page 20, Record) and section 4699 of the 1895 Revised Code of North Dakota defines a mortgage as follows: "Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. A mortgage of real property can be created, renewed or extended only by writing, executed with the formalities requred in case of a grant of real property."

The record, together with the statute, shows the mortgage was a contract pledging the real estate in question for the payment of $3,000 and as shown in our first brief that it contained a power of sale permitting its foreclosure by advertisement.

That is all that is necessary to make a valid mortgage and it is unnecessary for the record to show any more, the interference with plaintiff in error's right under this contract by the construction given the statute by the Supreme Court of North Dakota is the subject of our complaint here.

IRA B. MILLS,
WILLIAM C. RESSER and
ERNEST B. MILLS,
Counsel for Plaintiff in Error.

Office Supreme Court
FILED
MAR 15 1901
JAMES H. McKENNEY,
Clerk

No. 231.

Brief of Pinney for D.C.

BRIEF OF DEFENDANTS IN ERROR.

IN SUPREME COURT,

OF UNITED STATES.

October Term, A. D. 1900.

231

Filed Mar. 15, 1901.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO.; F. X. GOULET; HORACE HANCE AND EDWARD B. HANCE, LATE PARTNERS AS HANCE BROTHERS; FARGO GAS & ELECTRIC CO., HENRY E. MAGILL; S. F. REMER, AS REMER ROOFING CO.; MATT NUREMBERG, FRANK PORWELL, AND A. GRUBER, AS GRUBER & CO.

Defendants in Error.

SAMUEL B. PINNEY,
Attorneys for Defendants in error.
Fargo, N. D.

Geo. W. Newton, Emerson H. Smith,
John D. Benton, V. R. Lovell and
C. L. Bradley,
of Counsel, Fargo, N. D.

Forte & Company, Printers, Fargo.

IN SUPREME COURT,

OF UNITED STATES.

October Term, A. D. 1900.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO.; F. X. GOULET; HORACE HANCE AND EDWARD B. HANCE, LATE PARTNERS AS HANCE BROTHERS; FARGO GAS & ELECTRIC CO., HENRY E. MAGILL; S. F. REMER, AS REMER ROOFING CO.; MATT NUREMBERG, FRANK PORWELL, AND A. GRUBER, AS GRUBER & CO.

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

I.

STATEMENT OF FACTS.

To correct the statements following the beginning of the last paragraph on page 6 of brief of Plaintiff in Error,

we state further facts, as follows: The action was commenced in November, 1898, (not 1899). See record, p. 12, folio 17, where the endorsement of the sheriff appears, "Received for service, Nov. 16th, 1898". And it was actually tried in the district court before November, 1899. The summons, as printed in the record, has an erroneous date.

All the parties having unsatisfied mechanics liens upon the lot and building joined as plaintiffs, under the provisions of the Code of Dakota Territory and of the Code of North Dakota. Session Laws, 1883, Dak. Ty., Ch. 83, p. 198; Comp. Laws, 1887, Sec. 5481; Rev. Codes, N. D., 1895, Sec. 4796.

The Plaintiff in error, one of the defendants in the state court, appeared in said action and filed its answer to the complaint of the plaintiffs. (Tr. of Record, p. 13-14.) All the other defendants defaulted. (Tr. of Record, p. 15, f. 22 and p. 16.) The plaintiffs in their complaint allege facts showing that the building in question cannot be removed unless first torn down and destroyed, and allege that it would be for the best interest of all parties to have the lot and building sold together, etc. (Tr. of Record, p. 10, par. 21.) The Plaintiff in error in its answer alleges like facts. (Tr. of Record, p. 14, folio 20 and p. 15.)

The action was tried to the court without a jury, upon certain stipulated facts, (not shown in the record), and certain oral and documentary evidence (not shown in

the record), and thereupon the court made and filed its Findings of Fact (Tr. of Record, pp. 20-28) and Conclusions of Law (Tr. of Record pp. 28-31), and thereby sustained tne contention of the plaintiffs and established their several liens in the order in which they were filed. (Sec. 664, Code of Civil Pro. of Dak. Ty., 1877; Comp. Laws Dak. Ty. Sec. 5478), upon the said Lot 6 in Block 5 and the said building thereon, but subordinate and inferior to the lien of the Plaintiff in error upon said lot, and superior to the lien of such plaintiff upon said building. (Tr. of Record, p. 30, folio 42, par. 9.) The court found as a *question of fact* that it would be for the best interests of all parties that said lot and the improvements thereon should be sold together—that the lot and improvements were of equal value, and that each is of the value of at least $2,500.00, (Tr. of Record, p. 28, folio 41), and directed judgment to be entered for the sale together of the lot and building and improvements thereon, and for the division of the money, one-half to the Plaintiff in error, and from the other half, that the plaintiffs' liens (Defendants in error) and cost be paid, if sufficient; and if not, then so far as may be. But if there is any excess, then the same be paid to the Plaintiff in error (Tr. of Record, p. 30, par. 11.) Thereupon, on the 10th day of May, 1899, judgment was entered, as directed. (Tr. of Record, p. 31, folio 45 and p. 43.) There is a stipulation and order amending the findings and judgment in a matter of detail. (Tr. of Record. p. 43, folio 63, and p. 44.)

Thereupon an appeal was taken by the Plaintiff in error from said judgment to the supreme court of North Dakota, (Tr. of Record, p. 44, folio 65), and the record certified to such court, (Tr. of Record, p. 46, folio 69, and p. 47), and errors assigned in said court challenging the conclusions of law made from the facts found in the district court. (Tr. of Record, p. 47, folio 70 and p. 48-49.)

The only error assigned that is deemed material at this time is as follows: "(a) In holding * * * * * * Second, That said part of Sec. 4795 of the Revised Codes of 1895, which authorizes a sale of the whole premises upon which a mechanics lien is filed and a division of the money arising from such sale, so as to give the prior mortgage, or other prior lien, priority on the lot, and the mechanics liens priority on the building or improvement is in violation of Section Ten of Article One of the Constitution of the United States, and Section Sixteen of Article One of the Constitution of North Dakota, as to mortgages given prior to its passage." (Tr. of Record, p. 48, folio 72.)

The supreme court of North Dakota affirmed the judgment of the district court of Cass County (Tr. of Record, p. 49, folio 72). The opinion of the supreme court of North Dakota is printed at length in the record at p. 50 to 54. A petition for re-hearing was presented to the supreme court of North Dakota and denied. (Tr. of Record, p. 55-56.) Thereupon the Plaintiff in error sued out a writ of of error and removed the record to this court. (Tr. of

Record, p. 57-64.)

There are four errors attempted to be assigned in this court, (Tr. of Record, p. 61), but it is not discovered that any question within the jurisdiction of this court is raised by any of such assignment, except the third, which reads as follows: "Third. In holding, adjudging and deciding that part of Section 4795 of the 1895 Revised Codes, of the State of North Dakota, viz.: "But if in the opinion of the court it would be for the best interests of all parties that the land and improvements thereon should be sold together, it should so order, and the court shall take an account and ascertain the separate values of the land, and of the erection, building or other improvements and distribute the proceeds of sale so as to secure to the prior mortgage, or other lien, priority upon the land, and to the mechanics lien priority upon the building, erection or other improvement", was in violation of Section Ten Article One of the Constitution of the United States, in so far as it is applied to the mortgage described in the first assignment of error and the title of the Red River Valley National Bank of Fargo acquired under a foreclosure of said mortgage." The first assignment of error referred to is found at the top of p. 61 of record.

II.

STATUTORY PROVISIONS.

The plaintiff in error seems to make but two points in its brief. The first is stated on p. 14, as follows: "We

contend that the remedy given by the statute to foreclose a mortgage by advertisement, under the power of sale, which includes the sale, the certificate and the deed, on the expiration of the period allowed for redemption, are all parts of the mortgage contract, and any law that interferes with, renders less valuable or divests the title acquired under a foreclosure by virtue of the statutory remedy impairs the obligation of the contract and is therefore void." The other point is found upon p. 17. It is not stated very clearly, but the affirmation and interrogatory show the contention. We shall print some parts of the statutes the defendants in error rely upon herein, notwithstanding the same may appear in the brief of Plaintiff in error.

The mortgage under which the plaintiff in error derives its title was dated July 8th, 1884, and filed for record July 19th, 1884. (Tr. of Record, p. 20, folio 29.) The Constitution of North Dakota did not come into operation until November 2nd, 1889.

The mechanics lien law of Dakota Territory in force prior to January 1st, 1896, so far as the same is relevant to any question within the jurisdiction of this court upon this record, is found in Ch. XXXI of the Code of Civil Procedure of Dakota Territory of 1877, Sec. 655, p. 586 of the Revised Codes of 1877. (See brief of Plaintiff in error, p. 20, Sec. 655.) Following such section are provisions in regard to sub-contractors upon works of internal improvement, not deemed material here. Sec. 662 is

material. (Brief of Plaintiff in error, p. 23, Sec. 662.)

The same provisions form Sec. 5469 and 5476 of the Comp. Laws, Dak. Ty., of 1887, except the matter contained in the proviso to Sec. 5469 has been added. Then follows a provision requiring the clerk of the district court, where the lien is filed, to make certain entries relating thereto. Sec. 663. (See brief of Plaintiff in error, p. 24, Sec. 663.) And Sec. 664, brief of Plaintiff in error, p. 24, relates also to priority of lien holders between themselves, and as against other incumbrances subsequently made. Then Sec. 665 defines to what property the lien extends, and is found on page 25 of brief of Plaintiff in error. The same provision is contained in Comp. Laws of 1887, Sec. 5479. And Sec. 666 reads: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." See same provision in Comp. Laws of 1887, Sec. 5480. The foregoing seem to be all the material provisions of the law relating to mechanics liens that were in force at the time the mortgage under which the Plaintiff in error deraigns title was executed or put of record.

There are a few other provisions of the statutes of

Dakota Territory and North Dakota that are material. They relate to the effect of a foreclosure of a mortgage by advertisement. The Plaintiff in error has not put them in its brief, but seems to assume or take it for granted that the statutory foreclosure of its mortgage wiped out all other liens. That is clearly an error. It was only a limited foreclosure. We quote the material provisions as follows. Sec. 614 of the Code of Civil Procedure, in the revision of 1877, p. 580, reads as follows: "(Effect of record and title.) A record of the affidavits aforesaid and the deed executed upon a sale of the real property shall vest in the purchaser or person acquiring title thereto by redemption, or otherwise, the same force and validity as the deed upon the foreclosure by action provided for in Sec. 623 of this Code." The same provision is contained in Sec. 5428 of the Comp. Laws of 1887, except that it refers to the different numbered sections in that revision. Sec. 623, referred to in Sec. 614 is as follows: "Whenever any real property shall be sold under an order, decree or judgment of foreclosure under the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale, as provided by Sec. 606 of this Code, and at the expiration of the time for redemption of such mortgaged premises, if the same be not redeemed, the person or officer making the sale, or his successor in office, or other officer appointed by the court, must make to the purchaser or purchasers, their heirs or assigns, or to any person acquiring the title of

such purchaser by redemption or otherwise, a deed or deeds to such premises which shall vest in the purchaser, or otner party entitled thereto, the *same estate* that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any time thereafter; and such deed shall be as valid as if executed by the *mortgagor* and *mortgagee* and shall be a complete bar against each of them, and against all the parties to the action in which the judgment for such sale was rendered and against their heirs respectively and all persons claiming under such heirs."

The foregoing are the provisions of the statutes relating to the force and effect of a statutory foreclosure in force in Dakota Territory and North Dakota, down to January 1st, 1896. They cover the whole period during which the plaintiff in error was taking steps to obtain the title it now asserts. The statutes were changed in the revision of 1895. Sec. 5856.

III.

ARGUMENT AND POINTS.

EFFECT OF STATUTORY FORECLOSURE.

Construing Sec. 623, abstractly, the word "estate" therein used refers to the kind or quantum of interest covered by the mortgage, but it is confined to title and not to mere liens. And the same is true of the clause, "or at any time thereafter". This clause refers to estate, and

nothing else; that is, such estate in the real property as the mortgagor had at the time the mortgage was given or has acquired at any time since. The point is clear from the language which follows: "Such deed shall be as valid as if executed by the mortgagor and mortgagee. So the sheriff's deed is equivalent to a deed executed by the mortgagor and mortgagee, but it seems to raise a question of time. However, it is in the present tense and can only refer to the date of the sheriff's deed. Clearly it cannot be construed to retroact to the prejudice of the lien holder. If it should be so held, then in connection with the prior sentence, it would cut off all prior sales and all subsequent liens—an absurdity. So its force is only that it conveys to the grantee, under the sheriff's deed, *the same estate* that a deed of like date, if executed by the mortgagor and mortgagee to him, would convey. It conveys the estate of the mortgagor and lien of the mortgage foreclosed, and nothing more. The expression of one thing is the exclusion of all others. The rule is applicable here. The language cannot affect any other interests in the property than the estate of the mortgagor and the lien of the mortgage—no other liens. And this contention is re-inforced by the fact that if the foreclosure is bad, the grantee in the sheriff's deed becomes the assignee of the mortgage lien of the mortgagee. In Packer v. R. & S. Co. 17 N. Y., 283, Mr. Justice Pratt, p. 298, says: "So far as the interest of the mortgagor is concerned, it is divested upon foreclosure by virtue of the power of sale contained in the

mortgage. Under that power, the purchaser, ofcourse, acquires title, *not as of the time of the execution of the instrument granting the power, but as of the time of the execution of the power.* He does not hold under the grantee of the power but directly from the grantor." Morevoer the Defendants in error never occupied the position of "redemptioners". See brief of Plaintiff in error, p. 46, Sec. 5421, Sub-div. 1 and 2. The right to redeem, it is believed is incident to every interest that is foreclosed. When a "redemptioner" comes to redeem he is required to pay only what the property sold for. It is a statutory right. In the case at bar the Defendants in error had not that right. But they might redeem under the general principles of equity, or be permitted to do so in an action for that purpose. In such case they would be required to pay the whole amount of prior liens irrespective of what the property sold for. Civil Code, 1877, Sec. 1715; Comp. Laws, Sec. 4339.

Spurgin v. Adamson, 18 N. W. Rep. 298; (Iowa).
Bunce v. West, et al., 17 N. W. Rep. 179 (Iowa);
Raynor v. Selmes, 52 N. Y., 579, p. 582;
Vroom v. Ditmas, 4 Paige Ch. 526, L. Ed. note;
Benedict v. Gilman, Id. 58. L. Ed. Note.
Gage v. Brewster, 31 N. Y. 218.

So much for the abstract proposition.

But the learned chief justice of North Dakota, in the opinion already rendered in this case, answers the concrete question against the contention of the Plaintiff in error.

It is not a federal question, but one strictly within the jurisdiction of the state courts, and the construction placed upon such provisions by the state courts must be followed by this court. In this very case, so far as necessary to its decision, the chief justice who wrote the opinion in the supreme court of North Dakota has given a construction to such statute. It is to the effect that it only forecloses the interest of the original mortgagor in the premises involved. He says: (Tr. of Record, p. 52, folio 77), "What were the rights of the mortgagee under the mortgage? Primarily to have the property covered by the mortgage, which was the naked lot, applied to the satisfaction of the debt secured by the mortgage. True, as to the mortgagor, the rights under the mortgage have ripened into title. His right of redemption has been foreclosed. But as to these lien holders whose rights in the building under the former law were superior to the rights of the mortgagee and which rights could not be affected by the foreclosure, the appellant must still rely solely upon its right under the mortgage." The same question upon the same Statute arose in the case of Laird-Norton Co. v. Herker, et al. 6 S. D. 509. 62 N. W. Rep. 104. See this point further considered infra.

IV.

THE LAW A PART OF THE CONTRACT.

It has been often affirmed by this court that the law in force at the time a contract is made enters into and

becomes a part of it. U. S. v. Quincy 4 Wall. 535; S. C. L. Ed. B. 18 p. 405-408. "These propositions may be considered consequent axioms in our jurisprudence. The laws which existed at the time and place of the making of a contract, and where it is to be enforced, enter into and form a part of it. This embraces alike those which affect its validity, construction, and discharge and enforcement." Mr. Justice Swayne, in Walker v. Whitehead, 16 Wall. 314; L. Ed. B. 21, p. 357, and in speaking of and enforcing like provisions in the mechanics' lien law of Iowa, this court says: "It entered into and became a part of their contract." Brooks v. B. & S. Ry. Co., et al., 101 U. S., 11 Otto, 443; L. Ed. B. 25, p. 1057-1060. The Defendants in error contend that it cannot be said that the enforcement of the law which entered into and formed a part of the contracts under which the Plaintiff in error claims in any way impairs the obligation of any such contracts. And we believe it has been universally so held by this court.

Lehigh Water Co. v. Easton, 121 U. S. 388; L. Ed. B. 30 p. 1059;
Denny v. Bennett, 128 U. S. 489; L. Ed. B. 32, p. 491;
Brown v. Smart, 145 U. S. 454; L. Ed. B. 36, p. 773.

V.

EFFECT OF THE LIEN LAW IN QUESTION.

The title of the Plaintiff in error to said Lot Six (6), Block Five (5), never extended to the building now thereon so as to exclude the mechanics' liens of the Defendants in

error. At common law ordinarily a building becomes a part of the realty. The same was true under the provisions of the Civil Code of Dakota Territory. See Civil Code, Sec. 163, et seq., Rev. Codes, 1877, Dak. Ty., p. 229-230. The common law rule, supra, or such rule as defined by statute, supra, may be changed or abrogated by, (1), the agreement of the parties, as by placing a chattel mortgage upon the building, or by selling the same separate from the land. Such act takes the building out of the common law or statutory rule. Certainly as between the mortgagor and mortgagee and persons claiming under them, or between the vendor and vendee and persons claiming under them. Myrick v. Bill, 3 Dak. Ty. Rep. 284, p. 288, and cases cited. Or, (2) by a statute, as where as in several of the states a mechanic or material man is given a lien upon the building separate from the land and in preference to all prior liens upon the land, and provision is made for enforcing the lien by sale and removal of the building or other erection. See 2 Jones on Liens, Sec. 1373, 2nd Ed. "A statute to this effect abrogates in favor of the lien the common law rule that things attached to the realty become a part of the realty, and that they cannot be afterwards severed without consent of the prior mortgees of the land." * * * * * * "The operation of the statute, in case there is a prior mortgage on the land, is to dissever the improvements from the realty by giving a superior lien on such improvements, and conferring on the purchaser the right to remove them." Id.

See also

Wimberly, Appellant, v. Maybury, et al. 94 Ala. 240; S. C. 10 South Rep. 157; S. C. 14 L. R. A. 305-309;
Turner v. Robbins, 78 Ala. 592;
Bedsole v. Peters, 79 Ala. 133;
Lane v. Jones, 79 Ala. 156;
Kansas City Hotel Co. v. Sauer, 65 Mo. 279.

The effect of such statutes is to give to the prior mortgagor a first lien on the lot or land and second lien on the building or other improvement subsequently erected, andto give to the mechanic's lien-holders a first lien on the building subsequently erected and a second lien on the lot or land. This very question was presented and decided in Newark Lime & Cement Co. v. Morrison, 13 N. J. Eq. 133. The chancellor says: "Upon the building itself it takes priority of any former encumbrance on the lands—upon the lands, it is subject to the lien of all prior encumbrances recorded or registered at the commencement of the building." p. 135. See also Fox v. Seal, 22 Wall, 424; L. Ed. B. 22, p. 774. Such is the position in which the assignor of the Plaintiff in error and the mechanic's lien-holders, the defendants in error, stood with reference to the property in question after their liens had been filed. The last lien was filed February 3rd, 1894. The sale of the property to the mortgagee, May 7th, 1894, under the statutory foreclosure did not change such relation. It could not divest the prior liens of mechanics and material-men upon the building. In the nature of things the foreclosure of a second lien cannot divest the holder of a first

lien of his right. The assignment of the sheriff's certificate by the purchaser at such foreclosure sale to the Plaintiff in error clearly conferred upon the latter no better or other right than the former possessed, and the same is true of the sheriff's deed. Sampeyreac v. U. S. 7 Pet. 222; L. Ed. B. 8, p. 665. So the title and interest of the Plaintiff in error to and in Lot Six (6), Block Five (5), was always and still is subject to the prior lien of the Defendants in error upon the building into which their labor and materials went, as an entire new structure.

The question and the very statute involved are discussed and construed as thus stated by the Supreme Court of South Dakota in Laird-Norton Co. v. Herker, et al. 6 S. D. 509, S. C. 62. N. W. Rep. 104. The court says: "The only effect of the foreclosure by advertisement and the execution of the sheriff's deed to appellant was to transfer to it the right and interest of the mortgagor and mortgagee, subject to the plaintiff's superior lien which remained in full force. Wilt. Mort. For. 814 and cases there cited. That a mechanic's lien, preferred and made paramount by statute, is not extinguisned and lost by the statutory foreclosure of an inferior incumbrance under a power of sale, is too clear to admit of argument or the citation of authority."

Howard v. R. R. Co. 101 U. S. 11 Otto, 837; L. Ed. B. 25, p. 1081.

VI.

REPEAL AND RE-ENACTMENT OF STATUTES.

It is contended that by the repeal of the statutes cited supra, when the Rev. Codes of North Dakota took effect, January 1st, 1896, the liens of the Defendants in error were thrown down and destroyed. There are two conclusive answers to such contention. (1) The rights of the Defendants in error under such liens were vested rights and could not be thrown down or destroyed by legislation; and, (2), the same provisions were re-enacted by the Rev. Codes, and so there was never in fact a repeal. Upon the first point the provisions of North Dakota Civil Code are apposite. Thereby it is provided, "There may be ownership of * * * * * * rights created or granted by statute." Comp. Laws, Sec. 2676. "In this Code the thing of which there may be ownership is called property." Comp. Laws, Sec. 2675. The foregoing provisions were in force in North Dakota at the time the liens involved in this action were earned and asserted (filed); but were repealed and re-enacted by the Rev. Codes of 1895. The liens of mechanics, etc., by Comp. Laws, Sec. 5469 are given to *secure* the payment, etc. Hathone v. Calef, 96 U. S. 2 Wall. 10; L. Ed. B. 17, p. 776. So such lien is clearly a *security*, and it has been denominated a statutory mortgage. We are again referred to the excerpt from Mr. Justice Swayne, supra. The contention then that the liens were destroyed by the so-called repeal of the statutes under which they were earned and asserted is answered by two distinct constitutional provisions, viz.: (a) The provision inhibiting the states from passing any

law impairing the obligation of contracts; and, (b) the inhibition against depriving one of property without due process of law.

See 2 Jones on Liens, Sec. 1558 2d Ed. and cases cited.
Suth. on Sty. Con. p. 626, Sec. 480;
Hoffman v. Walton, 36 Mo. 615;
Waters v. Mfg. Co., 32 S. E. Rep. 636 (Ga.);
Handel v. Elliott, 60 Tex. 145;
Strubel v. R. R. Co. 12 Wis. 67.

However, this is not a federal question but a question for the state court alone to determine, and it has been determined by the Supreme Court of North Dakota adversely to the contention of the Plaintiff in error, and in this very case. But upon the second point it is contended that there was in fact no repeal. The repeal of a law by a statute that re-enacts its provisions works no repeal, as there is no point of time when the provision is not in force. Such is the condition as regards the mechanic's lien law under which the liens in question accrued and were asserted. It was repealed by the Rev. Codes of 1895, but re-enacted therein, so they were continuous and are still the law.

Bear Lake & R. W. W. & I. Co. v. Garland, 164 U. S. 1; L. Ed. B. 41, p. 327.
Pacific Mail S. S. Co. v. Joliffe, 69 U. S. 2 Wall. 459; L. Ed. B. 17, p. 808.

A citation from the opinion of Taylor, J., in Sheftels v. Tobert, 46 Wis. p. 446, will be useful at this point. He says: "The rule of construction applicable to acts which revise and consolidate another act or acts is that when

the revised and consolidated act re-enacts in the same words the provisions of the act or act so revised or consolidated, such revision and consolidation shall be deemed to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act. * * * * * * Fullerton v. Spring, 3 Wis., 667; Hurley v. Town of Texas, 20 Wis., 634; Laude v. C. & N. W. Railway Co., 33 Wis., 640; and Glentz v. The State, 38 Wis. 549-554. * * * * This court has also decided that when a law which was originally enacted as one chapter is afterwards broken up and scattered through different chapters of a revision of the laws, the provisions of the different chapters in which the same is found must receive the same interpretation as when they constituted but one chapter. Buckstaffe v. Hanville, 14 Wis., 77; State v. Messmore, Id., 115; Smith v. Smith, 19 Wis., 522-3." Merkle v. Twp. of B., 35 N. W. Rep., 846, (Mich.); Moore v. Twp. of K., 75 Mich., 332; Alexander v. City of Big Rapids, 38 N. W. Rep., 227, (Mich.)

But compare the two lien laws:

Com. Laws, Sec. 5469:

Every . . . person who shall do any labor or furnish any material . . . for any building . . . by virtue of any contract with the owner, his . . . contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done or materials . . furnished, a lien upon such building . . etc., to secure the payment, etc., etc.

Rev. Codes, Sec. 4788:

Any person who shall perform any labor upon or furnish any material . . . for the *erecting* . . . of any building . . . under a contract with the owner *of such land,* his . . contractor or sub-contractor, shall, upon complying with the provisions of this chapter, have for his labor done and materials . . . furnished, a lien upon such building . . etc., to secure the payment, etc., etc.

The words found in Sec. 4788, Rev. Codes, and not in Sec. 5469, Comp. Laws, are clearly implied in the latter, so notwithstanding the fact that the provisions of the Revised Codes have enlarged upon the provisions of the Compiled Laws, yet to the extent that the latter reaches they are identically the same. In Suth. St. Con., Sec. 133, the rule is stated as follows: "The portions of the amended sections which are merely copied without change are not to be considered as repealed and again re-enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule." See cases cited by the author, Note 3.

And in Sec. 134. "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the enactment takes effect at the same time. * * * * Offices are not lost; corporate existence is not ended; inchoate statutory rights are not defeated; a statutory power is not taken away nor criminal charges affected by such repeal and re-enactment of the law on which they respectively depend." See cases cited in Notes 3 to 8 inclusive. There was no repeal.

VI.

THE CONSTITUTIONAL QUESTION.

It further remains to consider the matter specifically noticed in the Third error assigned. The provision of the Rev. Codes of 1895 therein quoted and of the application of which by the courts of North Dakota in this action complaint is made by the Plaintiff in error, is an amendment of Sec. 666 of the Code of 1877, and hereinbefore quoted, supra. Such amendment first went into effect on the 1st day of January, 1896, and in a sense as applied to the case at bar it is retroactive. The complaint is that the application of such provisions in this action violates Sec. 10, Art. 1 of the Constitution of the United States inhibiting the states from passing any law impairing the obligation of contracts. Clearly the contract obligation asserted to be impaired must be found in or arise from some one or all of the several contracts under which the Plaintiff in error acquired its interest in the real property in question, that is to say, in the mortgage given by Elvira Cooper to the Travelers Insurance Co. upon Lot Six (6), Block Five (5), original townsite of Fargo, and recorded July 19th, 1884; or, in the sheriff's certificate given to the purchaser, the Travelers Insurance Co., at the sale of said real property upon the statutory foreclosure of such mortgage; or, in the assignment of such certificate to the plaintiff in error; or, in the sheriff's deed executed to the Plaintiff in error after the time for redemption had expired; or in all of such instruments combined. Each and

all of the several contracts under which Plaintiff in error acquired its interest in the premises and constituting its muniments of title, were executed, delivered and accepted under statutes reserving the right to persons furnishing labor or materials for the erection of an entire new building, a lien upon such building as security for the payment, etc., in preference to the lien of a prior mortgage upon the land. The enforcement of a statute under and in reference to which a contract is made and into which contract the law entered and became a part of, cannot in any sense be said to impair its obligation. Prov. Inst. &C. v. Mayor &c. of Jersey City, 113 U. S. 506; L. Ed. B. 28, p. 1102. So therefore to the extent that the judgment complained of enforces a priority of lien upon the building in question in favor of the defendants in error, the contention of the Plaintiff in error is entirely without merit.

But in so far as the amendment to Sec. 666, supra, set forth in the Third error asigned provides that an account be taken and the separate value of the lot and the building to be found, etc., it is a change in the statute in force not only when the Plaintiff in error acquired its interest in the premises, but also when the Defendants in error acquired their liens thereupon. And as hereinbefore intimated, it is in a sense a retroactive law. However, for that reason alone it is premised it cannot be condemned or declared invalid. "That a statute is not void because it is retrospective has been repeatedly held by this court, * *. Nor does every statute which affects the value of a

contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contract previously made, * * * or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force."

Curtis v. Whitney, 13 Wall. 68; L. Ed. B 20, p. 513.

"Almost every law providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.' * * * It forms no objection to the law that the cause of action existed antecedent to its passage, so far as it applies to the remedy and does not affect the right."

Sampeyreac v. U. S. 7 Pet. 222; L. Ed. B. 8, p. 665.

The position of the Plaintiff in error seems to resolve itself into the contention that the exercise in this case by the court of the authority conferred upon it by such amendment in some way impairs the obligation of the contracts under and by virtue of which the Plaintiff in error attempts to deraign its asserted exclusive title to the premises in question. All of the contracts constituting such Plaintiff's muniments of title have now passed to that stage known in law as executed contracts, except as later herein noticed. The obligation of such contracts is the law which binds

the parties to them to perform their agreement. Sturges v. Crowinshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213. But wherein is there an effort being made or action asked capable of being deemed or construed an impairment of the obligation of any or all of such contracts. It is submitted that there is no point of view from which such result can be discovered.

Again, the obligation of a contract is said to be: "The means provided by law by which it can be enforced —by which the parties can be obliged to perform it." And also: "Whatever legislation lessens the efficiency of these means impairs the obligation." Suth. on Sty. Con. p. 613, Sec. 471. "The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficiency for its enforcement."

Suth. on Sty. Con. p. 613, Sec. 471, citing
Green v. Biddle, 8 Wheat. 92; B. 5, p. 547;
Ogden v. Saunders, supra;
Bronson v. Kinzie, 1 How. 319; L. Ed. B. 11, p. 143;
McCracken v. Hayward, 2 Id. 612; L. Ed. B. 11, p. 397;
Walker v. Whitehead, 16 Wall. 314; L. Ed. B. 21, p. 357;
Van Hoffman v. Quincy, 4 Wall 535; L. Ed. B. 18, p. 403;
Edwards v. Kearzey, 96 U. S. 595; L. Ed. B. 24, p. 793;
Tenn. v. Sneed, Id. 69; L. Ed. B. 24, p. 610;
Mason v. Haile, 12 Wheat. 370; L. Ed. B. 6, p. 660;
Povident Inst. &c. v. Mayor &c. of Jersey City, 113 U. S. 506;
L. Ed. B. 28, p. 1102.

It is in no way disclosed by this record and cannot be discovered in what way the obligation of any contract which the Plaintiff in error is entitled to have enforced is impaired by the judgment complained of. Certain it is, that no obligation of any of the contracts by which the Plaintiff in error acquired and now holds its interest in premises in question is impaired, for the statute in question and the judgment rendered herein in pursuance of such statute fully recognizes the obligation of such contracts, and scrupulously protects the plaintiff in the exclusive enjoyment of its full interests in the property. "It neither took away any pre-existing right nor rendered less efficient any pre-existing remedies."

Louisiana v. New Orleans, 102 U. S. 203; L. Ed. B. 26, p. 132.

The claim of the Plaintiff in error stated according to its true sense and meaning is that it now complains because it is not allowed by the courts and the law of North Dakota to appropriate without compensation the labor and material expended upon the premises in question by the Defendants in error, or their assignors. No wonder the learned Chief Justice of the Supreme Court of North Dakota says, if such contention prevail, the Plaintiff in error will "enjoy the rare good fortune of having the value of its property doubled without any expense to itself." Tr. of Record, p. 51, f. 76.

We quote so much of the amended section as is pertinent. Words and letters dropped from the original section

are in parentheses; Rev. Codes, 1895, Sec. 4795. Words and letters added are in italics. "The liense for the things aforesaid, or *the* work, *including liens for additions, repairs and betterments* shall attach to the building(s), erection(s) or improvement(s) for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which (the same) *such erection, building or improvement belongs or* is erected or put (and any person enforcing such lien may have). *If such material was furnished or labor performed in the erection or construction of an independent building, erection or other improvement commenced since the attaching of such prior lien, incumbrance or mortgage, the court may in its discretion order and direct* such building, erection or (other) improvement *to be separately* sold under execution and the purchaser may remove the same within (a) *such* reasonable time (thereafter) *as the court may fix. But if in the opinion of the court it would be for the best interests of all parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate values of the land and of the erection, building or other improvement and distribute the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land and the mechanic's lien priority upon the building, erection or other improment."*

The changes effected by the foregoing amendments and complained of by the Plaintiff in error relate to the

remedy exclusively. They attempt neither to establish nor to destroy substantive or proprietory rights of either the holder of the mortgage lien or of the mechanic's lien-holders, but they do attempt to provide a better and more efficient remedy for the enforcement of rights otherwise created. However, they are retroactive in the sense that every statute relating to the remedy or procedure is retroactive when used to enforce rights existing before its passage.

Upon the principles already discussed the remedy existing at the accrual of a contract right cannot be challenged on the ground that it impairs the obligation of the contract. Van Hoffman v. Quincy, 4 Wall. 535; L. Ed. B. 18, p. 403. In practice the question arises upon the change in the law and the well established rule in regard to the change of the law of the remedy, or of the remedy, is, "without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." Marshall, C. J. in Sturgis v. Crowinshield, 4 Wheat. 122; L. Ed. B. 14, p. 529.

And all the decisions seem to hold to the same view.

Ogden v. Saunders, 12 Wheat. 213; L. Ed. B. 6, p. 606;
Beers v. Haughton, 9 Pet. 329; L. Ed. B 9, p. 145;
Tenn. v. Sneed, 96 U. S. 69; L. Ed. B. 24, p. 610.
Cooley's Con. Lim. 6th Ed. p. 347, et seq., and cases cited;
Curtis v. Whitney, 13 Wall. 68; L. Ed. B. 20, p. 513;

Ewell v. Daggs, 108 U. S. 143; L. Ed. B. 27, p. 682;
U. S. v. Quincy, 4 Wall. 535; L. Ed. B. 18, p. 403-409;
Suth. Sty. Con., p. 619, sec. 476-478 and cases cited;
Walker v. Whitehead, 16 Wall. 314; L. Ed. B. 21, p. 357;
Louisiana v. New Orleans, 102 U. S. 203; L. Ed. B. 26, p. 132;
Bronson v. Kinzie, 1 How. 311; L. Ed. B. 11, p. 143;
Mason v. Haile, 12 Wheat. 370; L. Ed. B. 6, p. 660;
White v. Hart, 13 Wall. 646; L. Ed. B. 20, p. 685.

In Tenn. v. Sneed, (96 U. S. 69; L. Ed. B. 24, p. 610), the principle is stated thus: "The rule seems to be that in modes of procedure and of forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarass it with conditions or restrictions as seriously to impair the value of the right. Bronson v. Kinzie, supra." We add illustrations from some of the numerous decisions of the state courts and text writers upon the subject. "Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending and future actions." Suth. Sty. Con., Sec. 482, p. 630 and cases cited. Rev. Codes, 1895, Sec. 5148; also Sec. 5142. "Laws giving more efficacious remedies or improving existing ones, or adding new ones, or removing disabilities or penalties, do not impair the obligations of contracts." John Norton Pome-

roy's note to Sedg. on Con. of Sty. and Con. Law, p. 617, 2d Ed., and cases cited.

The amendment under consideration even when considered in view of the principles laid down in the case of James River Lumber Co. v. Danner, 3 N. D. 470, much relied upon by the Plaintiff in error (Tr. of Record, p. 55), is not open to the charge of impairing the obligation of contracts. The case sought to enforce a lien on the building for restoring the roof destroyed by fire. The court says: "The remedy of sale and removal of the building is not given to enforce the lien generally, but merely to make efficacious the priority of the lien, as against an existing mortgage on the land. The owner who furnishes material has clearly a lien on the whole property, land and all—subsequent to the lien of the mortgage. This lien he enforces in the ordinary way. But this part priority of lien which the statute vests in him is enforced in the statutory manner, and in that manner alone. The priority of lien is upon the whole building. To enforce it, there has to be a sale of the whole building and the purchaser may remove the whole building. Where this cannot be lawfully done, as against the mortgagee, the priority of lien does not exist." The Plaintiff in error seems to invoke such decision as a rule of property. But, clearly it is not such to it. However if it be so considered, it canont aid the Plaintiff in error, as it cannot be extended or expanded beyond the facts on which it is based. The case at bar is not within the facts or the rule deduced

therefrom. Nor does the contention raise any federal question. That decision is not the law of this case. Nor is it capable of being invoked as an estoppel by judgment or otherwise. It lacks all of the four "identities." 2 Black, Judgments, 610. See Stryker v. Crane, 123 U. S.; L. Ed. B. 31, p. 194. But no question within the jurisdiction of this court upon this record can be raised on the construction placed upon the state statutes that entered into the contracts in question by the state courts. The decision of the state court is not a law within the meaning of Sec. 10, Art. 1, United States Constitution. So the state courts in one action, at one time may rule the question one way, and thereafter, in another action overrule their former decision and rule the question another way, and it raises no question for this court under the constitutional provision named. The doctrine of stare decisis in no way presents a federal question.

The amendment to the statute now under consideration, if such decision was ever entitled to be given the force urged by the Plaintiff in error, is more in the nature of a validating act and not open to the claim made. "Laws validating contracts are not objectionable as impairing the obligation. Sparks v. Claffer, 30 Ind. 204; Welsh v. Wadsworth, 30 Conn. 149; Thornton v. McGrath, 1 Duv. (Ky.) 349."

Sedg. on Con. of Sty. and Con. Law, p. 617, note;
Randall v. Krieger, 23 Wall. 137; L. Ed. B. 23, p. 124;

Livingston v. Moore, 7 Pet. 569, p. 550; L. Ed. B. 8, p. 751-780;
Wilkinson v. Leland, 2 Pet. 627; L. Ed. B. 7, p. 542;
Kearney v. Taylor, 15 How. 494; L. Ed. B. 14, p. 787.

"To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity can be regarded as of that character. Consent to remedy the wrong is to be presumed. * * * * * * Even where no remedy could be had in the courts the vested right is usually unattended with the slightest equity. Cooley Con. Lim. 378."

Mr. Justice Swayne in Randall v. Krieger, 25 Wall. 137; L. Ed. B. 23, p. 124.

Perhaps the amendment in question was made to avoid the embarrassment suggested in the opinion of the case of James River Lumber Co. v. Danner, supra. "A very large proportion of the legislation in all the states is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out by or resulting from the utterances of the courts of the country." New Orleans v. New Orleans Water Co., 142 U. S. 79; L. Ed. B. 35, p. 943; Morley v. L. S. & M. S. R. Co., 146 U. S. 162; L. Ed. B. 36, p. 925.

This question was pressed upon the attention of the Supreme Court of North Dakota in this case, and that court held against it. In Brown v. Smart, (45 U. S. 451;

L. Ed. B. 36, p. 773, this court says: "The position taken by him (plaintiff in error) in the court below * * * * * * * * that the obligation of the contract with him has been unconstitutionally impaired, is clearly untenable because the statute of the state was in existence when the contract was made, and the subsequent decision of the court of appeals was not a law, within the meaning of the Constitution which declares that no state shall pass any law impairing the obligations of contracts." New Orleans Water Works Co. v. La. Sugar Refining Co., 125 U. S. 18; L. Ed. B. 31, p. 607; Cent. Land Co. v. Laidley, 159 U. S. 103-112; L. Ed. B. 40, p. 91. The decision in the case at bar involved the construction only of a state statute, in which this court must defer to the Supreme Court of North Dakota. In Lehigh Water Co. v. Easton, (121 U. S. 388; L. Ed. B. 30, p. 1059-1060), the question was whether an act of the legislature of Pa., passed in 1867 was repealed by a subsuquent act of 1874. The court says: "That is a question simply of statutory construction, which the state court was competent to determine, and whose judgment in reference thereto is not subject to re-examination in this court." The state court is the proper tribual to construe and determine the validity of the enactments of their own legislature.

Florentine v. Barton, 2 Wall. 210; L. Ed. B. 17, p. 783;
Freeborn v. Smith, 2 Wall. 160; L. Ed. B. 17, p. 922.

"A remedy may be provided for existing rights and new remedies added to or substituted for those which exist." Suth. Sec. 842, p. 330, and case cited. Com. v. Hall, 97 Mass. 570. (A decision upholding legislation taking away objection to variance in an indictment.)

"Where a right already existed it is in the power of the legislature to devise and provide a remedy." Suth. et al. v. DeLeon, 1 Tex. 250; P. O. C. R. R. Co. v. Gt. R. R., 46 Me. 69. (Legislation providing a remedy to effect the crossing of railroads.) Whipple v. Farrar, 3 Mich. 436, p. 445. (Legislation providing a remedy where none existed before.)

Reapers Bank v. Willard, 24 Ill. 433. (Legislation providing for enforcing obligation against the bank.) Sanders v. County, 44 N. H., 233. (Legislation changing county wherein insurance company may be sued.)

L. and O. R. Co. v. Ballard, 2 Met. (Ky.) 165. Legislation subjecting road, right of way, franchises and all property, real and personal, to a sale by chancellor to pay debts, etc.)

Union Co. v. Gilfillan, 93 Pa. St. 95; Granahan v. H. St. & St. Jos. R. R. Co., 30 Mo. 546. (Legislation providing action for labor for sub-contractor.)

Peters v. The St. L. & I. M. R. R. Co., 23 Mo. 107. (Legislation relating to laborers' liens.)

Lang's Appeal, 87 Pa. St., 114. (Legislation providing for assessment of damages in eminent domain.)

Templeton v. Horn, 82 Ill. 491. (Legislation allow-

ing redemption from sale of mechanic's lien.)

Holland v. Dickinson, 41 Iowa, 367; Penrose v. Erie Co. 56 Pa. St. 46. (Legislation providing a change in the remedy.)

Woodruff v. Scruggs, 27 Ark. 26; Rader v. Road District, 26 N. J. Law, 273; Lycoming v. Union County, 15 Pa. St. 161, and cases cited. Legislation providing remedy to enforce moral obligation theretofore existing.)

Sedg. Co. v. Bunker, 16 Kas. 190.
Wimberley, Appellant, v. Maybury et al., 94 Ala. 240; 10 South Rep. 157; 14 L. R. A., 305—309.

The fact that the building wholly erected may be sold and removed pertains to the remedy only. So the amendment complained of; and it in no way enlarges or diminishes the force and extent of the rights of the Plaintiff in error or the liens of the Defendants in error as declared by the statutes in force when they originated.

Hepburn v. Curtis, 7 Watts, 300, 32 Am. Dec. 760. Held that laws may be passed affecting, "suits pending and give to the party a remedy which he did not previously possess or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings." McLimans v. Lancaster, 73 Wis. 596; 23 N. W. Rep. 689. (Legislation authorizing a married woman to bring suit alone for injury to herself, held to apply to a pending action.)

Boston v. Cummings, 16 Ga. 102, held that an act

requiring deeds to be recorded within a limited time applied to deeds executed before its passage.

Wilbur v. Gilmore, 21 Pick. 250, (Mass.). Held, an act allowing an action by an executor for injury in the life time of the testator was not unconstitutional, even when applied to a trespass committed before the act went into operation. The court says: "The presumption against retrospective construction has no application to enactments which affect the procedure and practice of the courts, even where the alteration which the statutes make has been disadvantageous to one of the parties * * * * * * * * *. A law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions. No person has a vested right in any course of procedure, nor in the power of delaying justice, nor of deriving benefit from technical and formal matters of pleading. He has only the right of prosecution or defense in the manner described, for the time being, by or under the court in which he sues; and if the statute alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort. Takes away no vested right, for the defaulter can have no vested right in the state of the law which left the injured party without or with only a defective remedy." 6 Am. & Eng. Enc. of Law., 2d Ed. p. 946, et seq., and notes.

JudgeCooley's Con. Lim. p. 454, lays down this rule thus: "A party has no vested right in a defense based

upon an informality not affecting his substantial equities." See also New Orleans v. Clark, 95 U. S. 644; L. Ed. B. 24, p. 521. "The best general rule laid down showing the validity of such statutes is given in 1 Kent, Com. 456, where it is stated that statutes which go to confirm existing rights, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations, are clearly valid. See notes to Goshen v. Stonington (Conn.) 10 Am. Dec., beginning on p. 131, an extensive note on this subject and vested rights.

See also people ex rel. v. Spicer, 99 N. Y. 225, p. 233; Paine v. Woodworth, 15 Wis. 298; Rich v. Flanders, 39 N. H., 304; Sargent, Justice, in construing an act making persons competent as witnesses who were not so before, held, it applied to pending suit, and quotes and adopts the language of Mr. Webster in his argument in the case of Foster v. Essex Bank, 16 Mass. 245; 8 Am. Dec. 135; "A distinction must be made between acts which affect existing rights, or impose new obligations and acts which give new remedies for existing rights, and enforce the obligation of previous obligations." Wade on Retroactive Laws, Secs. 23 and 24. Cullahan v. Sweeney, 79 Cal. 537. It follows that even though the liens in question were not available under the Comp. Laws for want of an ample remedy, it was competent for the legislature to provide a remedy in the Revised Codes, and it is so did by the amendment to Sec. 4795.

VIII.

THE CONSTITUTIONAL QUESTION CONTINUED.

It further remains to inquire as to whether the court may enforce the lien by sale of the whole premises and a division of the money without encountering the inhibition of the Constitution. The Defendants in error pleaded matter (Tr. of Record, p. 10, par. 21) showing the necessity for such order, and so did the Plaintiff in error (Tr. of Record, p. 14, f. 20). We have shown that the title of the Plaintiff in error was acquired under a mortgage that was subject to the right of mechanics, etc., and a lien upon the new building erected, etc., and subject to the right to have such building sold and removed to satisfy such lien. However, the legislative assembly anticipated that such cases might arise, or that cases it may be had already arisen where both, or at least one of the parties, would be injured in some particular by such provision being enforced, and so it provided: "But if *in the opinion of the court, it would be for the best interests of all the parties* that the lands and improvements should be sold, etc. It is when the interests of all the parties would be advanced—not impaired—that the court is authorized to order the sale, and so the statute itself excludes every objection that can be raised against it by the Plaintiff in error. The court must determine judicially that it would be for the best interests of all the parties before the sale can be ordered and the court has so determined in the case at bar. (Tr. of Record, p. 28,

par. 14.) The question of "best interest" is purely one of fact and cannot be inquired of by this court. Again the remedy of the old Code is not available to the Defendants in error except to the extent that it is preserved in the new. So all rights must be enforced in accordance with the law now in force. "All rights of parties under mechanic's lien laws are to be ascertained and fixed by the law in force when the contract was made; but such rights are to be established and enforced by the law existing at the bringing of the suit." Philipps on Mch. Liens, Sec. 24, citing Willamette v. Riley, 1 Ore. 183. "The remedy which the law supplies for the enforcement of several obligations may attach to those already in existence, as well as those of the future. * * * * So existing rights may be enforced by additional remedies provided subsequent to the acquisition of such rights." Wade Retroactive Laws, Sec. 221, and cases cited. See also Sec. 222 for cases in which the foregoing principles have been applied and cases cited.

The judgment in question properly provided for the sale of the entire premises, and it violates no constitutional principle. The question here presented is not unlike that in an action for partition, where part of the co-owners object to a sale of the premises for the purpose of effecting a division. The exercise of such power violates no constitutional principles. 17 Am. and Eng. Enc. of Law, 785 et seq., and notes. And the entire property may be sold when there are several liens, and the money dis-

tributed according to the priorities of the several creditors. 13 Enc. Pl. & Pr. 1042, et seq., and notes.

Finlayson, et al., v. Crooks, 49 N. W. Rep. 398 (Minn.);
Kennedy v. Apgar, et al., 93 N. Y. 539;
Philipps, Mech. Liens, Sec. 238—239, and cases cited;
Wimberley, Appellant, v. Maybury, et al., supra;
Crosky, et al., v. N. W. M. Co., 48 Ill. 481;
Crundies v. Hartwell, 90 Ill. 324;
Bradley v. Simpson, 93 Ill. 93.

In Richardson, et al., v. Monson, et al., 23 Conn. 94, the court, in speaking of enforcing a statute authorizing an order of sale to effect a partition of real property acquired before the passage of such act, the constitutionality of the act being vigorously challenged, says: "It is purely a remedial law acting upon existing rights and providing a remedy for existing evils; disturbing no titles * * * * * * the object of the statute in question is only to provide a reasonable remedy for joint owners of real estate and has no reference to contracts, even remotely. Many laws affect contracts incidentally, and are not, for such cause, to be treated as unconstitutional." And in Newark Lime and Cement Co. v. Morrison, 13 N. J. Eq. 133, in enforcing a statute giving to mechanics, etc., liens upon the building as against the prior mortgage upon the land the chancellor says: "But it cannot be affirmed that the mortgagee has any vested right in any building or improvement not erected at the date of the mortgage, or

that a lien which gives to the party whose labor is employed or materials expended in the erection of such building, infringes upon any vested right of the mortgagee or infringes any constitutional provision. The wisdom or policy of such enactment is a matter exclusively for legislative consideration." p. 135.

The rights of parties are not divested by changing the form of the property from real property to money. Wade Retroactive Laws, Sec. 241, citing Norris v. Clymer, 2 Pa. St., 277, p. 284; Sargent v. Kulen, 2 Pa. St., 393. In speaking of a similar question in Lobrano v. Nelligan, 9 Wall. 295; L. Ed. B. 19, p. 694, this court says: "The principle which allows a change of security necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint, if the legislature, in varying the nature and extent of the security, takes care that the property is preserved." See also Williamson v. Berry, 8 How. 495; L. Ed. B. 12, p. 1170. Ogden v. Sauders12 Wheat. 266; L. Ed. B. 6, p. 606; R. R. Co. v. Nesbit, 10 How. 395; L. Ed. B. 13, p. 469. Carpenter, et al., v. Penna. 17 How. 456; L. Ed. B. 15, p. 127. In this case the court says: "This court has no authority to revise the act of Penna. upon the grounds of interest, policy or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the Constitution of the United States or the treaties and laws made under it.

Lock v. New Orleans, 4 Wall. 172; L. Ed. B. 18, p. 334;
Drehman v. Stifle, 8 Wall. 595; L. Ed. B 19, p. 508.

IX.

LIMITED EFFECT OF STATUTORY FORECLOSURE.

In the foregoing parts of this brief we have gone quite extensively into questions more or less bearing upon the points under discussion. Perhaps we have so done more fully than necessary to a consideration of the narrow question within the jurisdiction of this court upon this record. However that may be we believe the argument greatly elucidates the contention of the Defendants in error. There remains but one point more to consider i. e., what was the interest or right of the Plaintiff in error in the property in question—lot or building, or both—after the statutory foreclosure and the execution of the sheriff's deed as between it and the lien-holders, the Defendants in error. A further reference to the statutes of Dakota Territory and of North Dakota in regard to the effect of a foreclosure of a mortgage under a power contained therein becomes necessary. Code Civil Procedure, Dak. Ty., 1877, p. 580, Sec. 614 and 623; Comp. Laws, Dak. Ty., 1887, Sec. 5428 and 5437. At this point it should be observed that the burden is on the Plaintiff in error affirmatively to maintain its contention. The mortgage nowhere appears in the record, nor does any of its

provisions. Nothing appears in the record justifying the alleged foreclosure by the Travelers Insurance Company of the mortgage in question other than the allegation of the Plaintiff in error in its answer (Tr. of Record, p. 13, f. 19) to the effect that a sale was made "by virtue of the power of sale in said mortgage contained", and the court finds (Tr. of Record, p. 21, par. 2) as a fact that said premises were sold under proceedings duly had by advertisement, etc. So the question of fact is concluded by such finding. The learned Chief Justice of North Dakota, in the opinion in this action (Tr. of Record, p. 52, f. 77), responding to the contention of the Plaintiff in error that its rights had been unlawfully invaded by the judgment, construing the statutes, supra, and defining the effect of the statutory foreclosure in question, says: "True as to the mortgagor, the rights under the mortgage have ripened into title; his right of redemption has been foreclosed, but as to these lien-holders, whose rights in the building under the former law were superior to the rights of the mortgagee, and which rights could not be affected by the foreclosure, the appellant (Plaintiff in error) must still rely solely upon its right under the mortgage." The record no doubt assumes the validity of the statutory foreclosure, for some purposes, and even as against the defendant, Rosa Herzman, (not against the Defendants in error) but she is making no point, and Elvira Cooper and her husband were the mortgagors. There were, therefore, two points upon which the decision of the Supreme Court of North

Dakota was based: (1), that the mortgage under which the Plaintiff in error claims title, as against the interests of the Defendants in error, had never been foreclosed; and, (2), that the amendment to the Code of North Dakota authorizing a sale of the entire property—lot and building—and a division of the moneys according to the rights and equities of the respective parties, as applied to the facts disclosed in the record does not violate Sec. 10, Art. 1 of the Constitution of the United States. The first does not raise any federal question. It is based upon a construction of statutes in force when the mortgage was given and when the liens were filed. The fallacy of the contention of the Plaintiff in error, (though not well taken in other regards as we have shown), clearly rests in the effect attempted to be given to the foreclosure by advertisement of the mortgage under which it deraigns title. And that is a question exclusively within the jurisdiction of the state courts. The state court has in this action determined that such foreclosure did not affect the liens of the Defendants in error, so the lien—mortgage to Travelers Insurance Company,—held by the Plaintiff in error and the mechanics liens held by the Defendants in error had not been foreclosed when this action was commenced, and the judgment complained of only effected a foreclosure of the several liens and settled the preference of the several parties under such liens. And besides it upholds the obligation of every contract of every party, and in strict conformity to the rights established thereby under

the law in view of which they were brought into being. It is therefore clearly established that there is no federal question involved in this record. The judgment complained of then amounts only to a marshalling of assets by foreclosure and a sale of the property covered by liens (conflicting liens it may be) for the benefit of the lien-holders and to be distributed among them according to their respective rights and equities. See 13 Enc. of Pl. & Pr., p. 1042—11 and notes; Bernhardt v. Lymburner, 85 N. Y., 172; Kennedy v. Apgar. et al., 92 N. Y. 539; Finlayson et al., v. Crooks, 47 Minn. 74. The general equity powers of the court, without the amendment of 1895 complained of, (Tr. of Record. p. 61, Third) were sufficient to justify such judgment. And such is true even in view of the rule announced by the Supreme Court of North Dakota in James River Lumber Co. v. Danner, supra. But in the opinion in the case at bar the court adheres to the rule announced in the Danner case. It says, that when the building is so situated that it can be removed only by demolition, the court will not sanction its removal *where it would impair the right of the former mortgagee.* (Tr. of Record, p. 51, f. 76). The facts of the two cases are not the same. In the former the lien was for repairs,—restoration of a roof destroyed by fire—of a building covered by a prior mortgage. To remove the building would invade the rights of the mortgagee. In the case at bar, the lien is for the construction of an entire new building and the law appropriates the entire building to

the payment of the mechanic's lien-holders. Their lien is their security, before and in preferance to all other liens. A removal of the building by demolition would not invade the rights of the prior mortgagee—the Plaintiff in error. The contention of the Plaintiff in error is not apposite. Were the facts in the case at bar identical with the facts in the Danner case, and the court should apply the last paragraph found in Sec. 4795 of the Rev. Codes of 1895, which is an amendment of a prior statute and relates to liens for materials furnished or labor performed upon additions to, repairs of, or betterments upon buildings already constructed and covered by mortgage, then the principles urged by the Plaintiff in error might be apposite. But as the case is they are not. See Sec. 4795, Rev. Codes of 1895. The method established by law for the foreclosure of mortgages—a mortgage is only a lien—and liens upon real property, both in Dakota Territory and in North Dakota is by the sale of the property covered thereby. Code Civil Procedure. Dak. Ty., 1877, Sec. 617; Comp. Laws, Sec. 5431; Rev. Codes, 1895, Sec. 5866. And the same is true when a foreclosure is had by advertisement under a power. But a statutory foreclosure under a power contained in the mortgage was, prior to the Rev. Codes of 1895, only a limited foreclosure —it affected the interests of no one in the property except that of the mortgagor and mortgagee—those having subsequent liens upon or interests in the property—conventional or statutory—were not foreclosed. The purchaser under

the statutory foreclosure became an assignee of the mortgage as to all subsequent lien-holders and must seek relief by action in order to bar their interests. See opinion of Suprme Court of North Dakota in this action. (Tr. of Record pp. 50-54.)

Laird-Norton Co. v. Herker, et al., 62 N. W. Rep. 104 (S. D.);
Code Civil Procedure, Dak. Ty. 1877, Sec. 614;
Comp. Laws, 1887, Sec. 5428;
Benedict v. Gilman, 4 Paige Ch., 58; L. Ed. B. 3, p. 340; and notes and cases cited therein;
Vroom v. Ditmas, 4 Paige, Ch. 526; L. Ed. B. 3, p. 545 and notes and cases cited therein.

The foreclosure of the mortgage under which the Plaintiff in error claims by the Travelers Insurance Company by advertisement was in its effect nothing other or different than a foreclosure by action in which the mortgagee was plaintiff and the mortgagor was defendant and the interests of no other persons were affected thereby. It is so held by the Supreme Court of North Dakota in this very action, supra, and also by the Supreme Court of South Dakota in Laird-Norton Co. v. Herker, supra, and that question is not open to decision or consideration in this court upon this record.

X.

NO FEDERAL QUESTION.

In Brown v. Atwell, 92 U. S. 327; L. Ed. B. 23, p.

511, this court says, citing numerous authorities: "We have often decided that it is not enough to give us jurisdiction over the judgment of the state court for the record to show that a federal question was argued or presented to that court for decision. *It must appear that its decision was necessary to the determination of the cause and that it actually was decided,* or that the judgment as rendered could not have been given without deciding it." See also State, ex rel. v. The Board, etc. 98 U. S. 8 Otto, 140-142; L. Ed. B. 25, p. 114, and cases cited. In the case at bar the opinion of the state court shows that it actually decided a federal question, but it is submitted that such question was not necessary to a determination of the case. It must have been decided in the same way on other grounds and grounds which were actually considered. So it follows that this court is without jurisdiction to review the judgment complained of. Bacon, et al., v. State of Texas, 163 U. S. 207; L. Ed. B. 41, p. 132. But if this contention is not sustained, then it is insisted that the federal question was correctly decided by the Supreme Court of North Dakota, and its decision should be affirmed.

XI.

CONCLUSION.

The errors we have attempted to discuss are those assigned by the Plaintiff in error in suing out its writ of error to the Supreme Court of North Dakota. (Tr. of Record, p. 61). The first is quite confused; it does not

seem to refer to the mortgage under which the Plaintiff in error deraigns its alleged title to Lot Six, Block Five in question. However that may be we urge that it only suggests errors committed by the state courts in construing the statutes in force at the time the Travelers Insurance Company took the mortgage under which the Plaintiff in error claims. Such contention raises no federal question.

New Orleans Water Works Co. v. La. Sugar Ref. Co., 125 U. S. 18;
L. Ed. B. 31, p. 607;
Lehigh Water Co. v. Easton, 121 U. S. 388;
L. Ed. B. 30, p. 1059—1060;
Cent. Land Co. v. Laidley, 159 U. S. 103—112;
L. Ed. B. 40, p. 91.

The second is of no greater force and is open to the objection that the decision complained of only determines the rights and equities of the parties as between themselves, upon general principles of equity in view of the statutes and contracts under which their interests were acquired. That the Plaintiff in error is given thirty days time in which to pay the claims of the Defendants in error is only an act of descretionary grace extended by the court for the benefit of the Plaintiff in error—for its advantage. It cannot complain of such action. This assignment of error is equally wanting in force to raise any federal question. See authorities cited, supra. The third error assigned we have fully discussed. The fourth error assigned only challenges the judgment upon principles of general jurisprudence. Such judgment is not open to review in this court upon

this record on any such challenge. Such questions were exclusively within the jurisdiction of the state courts. Even though the judgment, "by the law of the land" ought to have been given in favor of the Plaintiff in error and against the Defendants in error, as asserted, it is clearly not within the jurisdiction of this court upon this record so to determine. Such assignment of error raises no federal question. See authorities cited, supra. The contention of want of due process of law is so clearly not tenable that we do not discuss it. We realize that we have discussed some questions not made in the brief of the Plaintiff in error. But they are questions that are raised upon the record, and the Plaintiff in error thereby would seem to have the benefit of them, so we discuss them. This course seemed quite necessary in view of the fact that it is expected that the interests of the Defndants in error will be submitted to the court without oral argument and upon this printed brief.

Respectfully submitted,

SAMUEL B. PINNEY,
Attorneys for Defendants in error.
Fargo, N. D.

Geo. W. Newton, Emerson H. Smith,
John D. Benton, V. R. Lovell and
C. L. Bradley,
of Counsel, Fargo, N. D.

Supreme Court of the United States.

No. 231.—October Term, 1900.

The Red River Valley National Bank of Fargo, Plaintiff in Error, vs. Archibald J. Craig, Menomonie Hydraulic Press Brick Company, et al. } In error to the Supreme Court of the State of North Dakota.

[May 13, 1901.]

This action was brought to enforce certain mechanic's liens provided for by section 4796, Revised Code of North Dakota, upon real estate described in the complaint. The trial resulted in a judgment in favor of the lienors, which on appeal was affirmed by the Supreme Court of the State, and the Red River Valley National Bank of Fargo, one of the defendants below, has brought the case here by writ of error.

The trial court found the following facts: On July 8, 1884, Elvira Cooper was the owner of the property, being lot 6, block 5, of the original townsite of Fargo, Cass County, North Dakota, and on that day she, with her husband, mortgaged it to secure the payment of the sum of $3,000 to the Travelers' Insurance Company of Hartford, Connecticut. Prior to January 1, 1893, the mortgagor sold and conveyed the property, subject to the mortgage, to one Rosa Herzman, who remained the owner until the foreclosure of the mortgage under the statute and the sale of the property to the insurance company, which took place on May 7, 1894, and on that day a sheriff's certificate of sale was issued to it. On January 12, 1895, the insurance company assigned this certificate of sale to the plaintiff in error, and on May 17, 1895, it received from the sheriff a deed of the premises. During the time of the ownership of the property by Rosa Herzman she erected upon the lot a two story and basement brick building, which was completed by February 3, 1894, and which still remains on the lot in good condition. During the summer and fall of 1893 various work was done and materials furnished upon and for the building for which the owner of the premises failed to pay in full, and thereafter and between November 17, 1893, and February 2, 1894, various persons who had furnished materials or performed work and labor for and in the erection of the house filed their liens, and subsequently, on November 15, 1898, commenced this action to foreclose the same against (among others) the plaintiff in error as the owner of the property.

It was also found by the court that the east and west walls of this new two story brick building were party walls, the east wall standing equally upon its own and the adjoining lot, while the west wall stood wholly upon its adjoining lot, and the walls were built in pursuance of an agreement to that effect between the owners of the different lots, so that the building in question and those on each side constituted a solid row of three brick buildings belonging to different owners, and the building was incapable of being removed from the lot unless it were first torn down. It was also found that it would be for the best interest of all parties that the land and the improvements thereon should be sold together, and that the land and the improvements were of equal value, each one being at least of the value of $2,500. The judgment, after adjudging the amounts of the liens of the various parties, gave the plaintiff in error the privilege of paying the same within thirty days from the service of a copy of the judgment, and in default, after proper notice, the property was directed to be sold by the sheriff of Cass County, and of the moneys received therefor one-half was directed to be paid and delivered to the plaintiff in error and from the other half the lienors were to be paid, and if there were any excess after such payment it was to be paid over to the bank.

At the time of the execution of the mortgage the mechanic's lien law then in existence was known as chapter 31 of the Code of Civil Procedure, as found in the Revised Codes of 1877. Sections 655, 666 and 667 are set out in the margin.*

---

* Chapter 31, Code of Civil Procedure of the Revised Codes of 1877, Territory of Dakota.

SEC. 655. *Lien, to whom and for what.*—Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery or fixtures furnished.

SEC. 666. *Lien superior to mortgage, when.*—The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

SEC. 667. *Action to enforce.*—Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court of the county or judicial subdivision wherein the property is situated.

At the time when the work was done upon and the materials furnished for the erection of the house the mechanic's lien law in force is to be found from sections 5468 to 5485, Compiled Laws N. D. 1887. Section 5469 is the same as section 655, of chapter 31, above mentioned, with the exception of an immaterial addition at the end of the section, while section 5480 is identical with section 666 of that chapter. Section 5481 is a substitute for section 667 of the same chapter, and is set forth in the margin.*

It is evident that the law was in substance the same on this subject when the mortgage was executed and when the work was done and the materials furnished.

The mechanic's lien law in existence at the time that this action was brought is to be found from sections 4788 to 4801, Revised Code of 1895. Section 4788 would seem to be a substitute for section 655 of chapter 31, above mentioned, and section 4795 is a substitute for section 666 of the same chapter. These sections are placed in the margin.†

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The Federal question in this case arises because of the legislation of North Dakota subsequent to 1884, the time of the execution of the mortgage to the Travelers' Insurance Company, the plaintiff in error contending that by reason of such legislation its rights, with reference to the prop-

*Compiled Laws, Territory of Dakota, 1887. (See section 667, *supra.*)

SEC. 5481. Any person having a lien by virtue of this article may bring an action to enforce the same in the district court of the county or judicial subdivision where the property is situated, and any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court may also allow as part of the costs the money paid for filing each lien and the sum of five dollars for drawing the same.

†Chapter 77, Revised Codes, North Dakota, 1895.

SEC. 4788. *Who may have and for what.*—Any person who shall perform any labor upon or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement or for the erecting, alteration or repair of any building or other structures upon land, or in making any other improvement thereon, including fences, sidewalks, paving, wells, trees, drains, grades or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall upon complying with the provisions of this chapter have for his labor done, or materials, machinery or fixtures furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which the work was done or the things furnished, to secure the payment for such labor, materials, machinery or fixtures. The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement,

erty herein, have to some extent been taken away or unfavorably affected, without due process of law, and it also contends that the subsequent legislation operated to impair the obligation of a contract arising out of the execution of the mortgage already mentioned, its foreclosure and the sale of the property to the insurance company, and its assignment to the plaintiff in error.

We think it was the legislative intent that the last statute should apply to past transactions and that no substantial rights of the plaintiff in error are thereby unfavorably affected, because, in our opinion, there is no such material difference in the several statutes, so far as regards the rights of the parties, as to forbid the application of the latest statute to a case where the mortgage was given and the materials furnished prior to its passage. The difference between that statute and its predecessors, so far as relates to the point in question here, has special reference to the remedy only and to the manner of executing the provisions of the statute in force at the time of the execution of the mortgage and also when the work was done and the materials furnished. It in reality solely affects the remedy, and does not

---

if at the time he had knowledge thereof and did not give notice of his objection thereto to the person entitled to the lien. The provisions of this section and chapter shall not be construed to apply to claims or contracts for furnishing lightning rods or any of their attachments.

SEC. 4795. *When prior to prior lien on land. Power of court.*—The liens for the things aforesaid or the work, including liens for additions, repairs and betterments, shall attach to the building, erection or improvement for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which such erection, building or improvement belongs or is erected or put.

If such material was furnished or labor performed in the erection or construction of an original and independent building, erection or other improvement commenced since the attaching of such prior lien, incumbrance or mortgage, the court may in its discretion order and direct such building, erection or improvement to be separately sold under execution, and the purchaser may remove the same within such reasonable time as the court may fix. But if in the opinion of the court it would be for the best interest of all parties that the land and the improvements thereon should be sold together, it shall so order, and the court shall take an account and ascertain the separate values of the land and of the erection, building or other improvement, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building, erection or other improvement.

If the material furnished or labor performed was for an addition to, repairs of or betterments upon buildings, erections or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs or betterments, and upon the sale of the premises distribute the proceeds of sale so as to secure to the prior mortgage or lien priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs or betterments.

thereby substantially alter those rights of the mortgagee or his representatives which existed when the mortgage was made. A mechanic's lien law was then in existence, and the mortgage was taken subject to the right of the legislature, in its discretion, to alter that law, so long as the alterations only affected the means of enforcing an existing lien, while not in substance enlarging its extent or unduly extending the remedy to the injury of vested rights. So long as those rights remain thus unaffected the subsequent statute must be held valid, although the remedy be thereby to some extent altered and enlarged. Looked at in this light, the legislation under review cannot be held to violate any rights of the plaintiff in error protected by the Constitution of the United States.

Section 655 of the old act provided for the lien and gave it to those persons who performed labor upon or furnished materials for a building, upon complying with the provisions of the chapter, (31). Section 666 provided for the enforcement of the lien in certain cases, and granted the right to any person having a lien to enforce the sale of the building, and to the purchaser the right to remove the same within a reasonable time. These two sections are reproduced in substantially the same language in the act of 1887, (in force when the work was done,) as sections 5469 and 5480 of the Compiled Laws of 1887, there being an immaterial addition in section 5469 to section 655, whose place it takes.

By the law of 1895, which was in force when this action was commenced, the old section 655 is somewhat elaborated by section 4788 of the Revised Code of that year, but the substance of the old section, so far as the facts of this case touch it, remains the same in the new section.

Old section 666 is amended by section 4795, Revised Code, which provides more in detail for the carrying out of the provisions of the old section. The old section itself provided for the enforcement of the lien which was given by that statute, and the last statute it must be remembered neither created nor extended that lien, but somewhat amplified the means to enforce or discharge it. By this alteration the prior statute was not altered to the disadvantage of the owner or his mortgagee in regard to those rights which the person furnishing the materials or performing the labor had under such prior statute. In that prior statute it was provided that the lien for the work done or materials furnished should attach to the buildings, erections or improvements for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which the same was erected or put, and any person enforcing such lien was granted the right to have the building, erection or other improvement sold under execution, and the purchaser had the right to remove the same within a reasonable time.

By the last act (section 4795) the same right still exists; the building may be sold separately and the purchaser may remove the same. There

is added, however, the further provision which permits the court for the best interests of all the parties to sell the land and the improvements together, and after ascertaining the separate values of the land and of the building, provision is made for the distribution of the proceeds of the sale so as to secure to the prior mortgage or other lien priority upon the land and to the mechanic's lien priority upon the building into which his labor or materials have entered.

True it is that the property was sold under the foreclosure when there was no right to sell the land in connection with the building for the purpose of paying the liens on the latter. The liens on the building, however, were there, and the building could be sold and removed to pay the amount thereof, and under the foreclosure the purchaser bought subject to that existing right. He thus obtained a title under which his building could be sold from under him and removed from the land. Under the amended statute the court may sell all the property, land and building together, and return to the owner the value of the land and the surplus arising from the building after payment of the liens. As the liens were in existence when the mortgage was foreclosed, we think the purchaser took title subject to the right of the legislature, in making a reasonable and proper amendment of the law, to provide in foreclosing the liens, for the sale of the whole property and the return to the owner of the lot of the full value thereof in money, instead of allowing him to keep the lot and have the building thereon sold and removed. The plaintiff' in error's property was already in the grasp of the statute creating the liens when the mortgage was foreclosed, and that fact is the material one for consideration with reference to the statute and its amendment.

The plaintiff' in error asserts that this change in the law rendered the mortgage security less valuable, and that, therefore, it impaired the obligation of the contract and was void. This is mere assertion, and we do not assent to its correctness. A mortgage which is already subject to the right of subsequent lienors, who furnish materials or labor in the erection of a building, to sell the same and have it removed for the payment of the liens, is not in our judgment reduced in value by the provision contained in the amendment under consideration.

Some reference has been made to a decision of the Supreme Court of North Dakota, decided before the foreclosure of the mortgage, and it has been said that it is therein decided that section 5480 of the Compiled Laws of 1887, which, as we have stated, is identical with section 666 of chapter 31, above mentioned, (in force when the mortgage was executed,) does not give any lien as against a mortgagee or one representing him in a case like this, because such lien could not be enforced without a demolition of the building, and in such case no lien is given, while by the latest statute it is asserted that the lien is given, and also an effective means of

enforcing it. In brief, it is urged that a lien is given by the last statute as against a mortgagee or his representative, in a case where it did not exist when the mortgage was made, as the Supreme Court of the State decided, and that such decision had been given when the mortgage was foreclosed and the property bid in by the mortgagee and then assigned to the plaintiff in error, and it is claimed that the subsequent statute giving the lien was a clear violation of the contract as against the plaintiff in error. *James River Lumber Company* v. *Danner*, (3 N. D. 470,) is the authority referred to for this contention, but an examination of the facts and the opinion of the court therein shows that no such proposition was decided. In that case there was a mortgage upon the whole of the property, which consisted of a lot with a brewery erected thereon. A fire occurred which to some extent damaged, without destroying, the building. It was therefore repaired, and for the materials for such repairs and for the labor expended on the building liens were filed, and the claim was made that they were liens superior to the mortgage thereon at the time the materials were furnished and the labor performed. This the court held was not the true construction of section 5480; that while that section gives the lienor the right to sell the building and the purchaser the right to have it removed, yet, no authority was given to sell the entire building to pay the lien of one who had only repaired it while a recorded mortgage existed against the land at the time he made the repairs. It was said that a lien for repairs upon a building covered by a mortgage at the time of the repairs would not justify a sale and removal of the building as against such mortgage; that priority of lien was given in cases where the whole erection might be sold and removed without unlawfully encroaching upon the right of the mortgagee of the land, and that a priority of lien existed only when a new structure had been put upon the land subsequently to the execution of the mortgage, and the one who claimed a prior lien must have contributed to the erection of such building by the furnishing of materials or the doing of work. And the court further held that as the work on the partially destroyed building was not begun until some time after the recording of the mortgage on the whole property, the lienor could not procure a sale of the whole building and give to the purchaser the right to remove it, and as this could not be done as against the mortgagee, the priority of lien did not exist. The court, however, recognizes in terms the existence of a lien under that statute, when a new structure has been put upon the land subsequently to the execution of the mortgage, if the person claiming the lien has contributed to the erection of the building by furnishing materials therefor or performing labor thereon.

In this case, the building did not exist at the time the mortgage was executed, and the liens were filed to secure payment for the materials used in its construction and the labor performed upon it, and no decision of the

Supreme Court of North Dakota has been called to our attention holding that under such circumstances there would not have been a lien upon the building in favor of the mechanics and prior to that of the mortgage executed before its erection. In such case as this it is clear that under the act in force when the mortgage was executed and when the labor was performed, a lien on the building was created by virtue of that act, and that the building could have been sold under it and the purchaser would have had the right to remove it notwithstanding, in order to do so, he would have been compelled to demolish the entire building.

One of the amendments contained in the last statute, which provides a means for the enforcement of a lien by the sale of the whole premises in the case of repairs upon a building already covered by a mortgage, was probably passed because of the above decision of the Dakota court, and we need not concern ourselves as to its validity, because the plaintiff in error does not occupy such a position as to enable it to raise that question, the whole building in this case having been erected subsequently to the mortgage. The same may be said as to any question which might upon other facts be raised because of the cutting off of an existing mortgage not yet due and the (claimed) impairment of the obligation of a contract by the sale of the premises under the provisions of the amended statute.

The mortgage in this case was past due and had been foreclosed and the land sold in 1894, subject to the lien on the building provided by the statute then in existence. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity. (*Supervisors* v. *Stanley*, 105 U. S. 305; *Clark* v. *Kansas City*, 176 Id. 114, 118; *Lampasas* v. *Bell*, 180 Id. 276, 283.)

The amendments to the old section 667, relating to the bringing of such an action as this, are simply of the same nature as those above discussed, amplifying to some extent, but not materially, the powers of the court as to the remedy.

The decision of the main question in this case is fatal to the rights claimed by the plaintiff in error, and the judgment must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.